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American Bar Association JOURNAL

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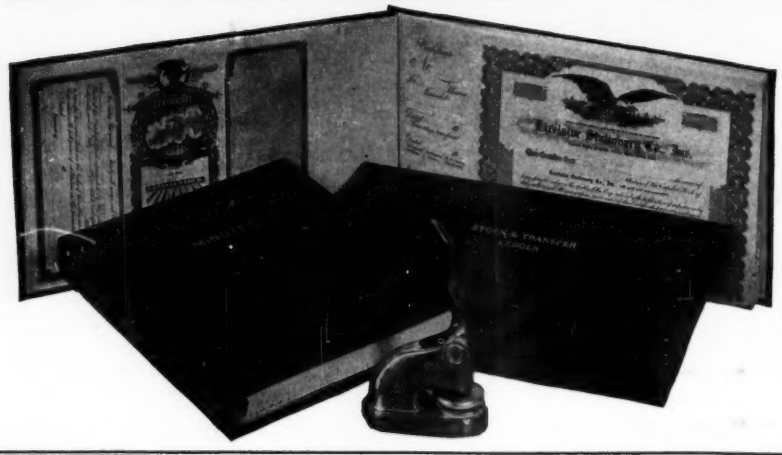

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December, 1959

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The President's Page

John D. Randall

Bethel, Gilgal and Mizpah—Bethlehem

In Chancellor Kent's *Memoirs*, he notes that an earlier judge, Samuel, went on circuit throughout Israel year after year, holding court in Bethel, Gilgal and Mizpah. The Chancellor estimated that he himself had held one hundred and forty-five different courts throughout New York in sixteen years on the bench of the Supreme Court of that state.

In some respects, the President of the American Bar Association is also on circuit. During October, I have attended state bar association meetings in Nebraska, Colorado, New Mexico and West Virginia. On the twenty-third of the month I was privileged to attend the impressive banquet in Ann Arbor which climaxed the celebration of the one hundredth anniversary of the founding of the Law School of the University of Michigan. Thereafter I went to the state bar meeting of West Virginia in Charleston.

The Board of Governors of the Association as well as the Section Chairmen and Vice Chairmen met in Chicago during the last week of the month. I next went to Washington where I addressed the class graduating from the police academy conducted by the Federal Bureau of Investigation. On that occasion I had the distinct pleasure of welcoming the Bureau's Director, J. Edgar Hoover, as a new member of the American Bar Association and I presented him with his certificate of membership.

On November 6 in Chicago, I joined with the members of the Illinois State Bar Association and the Chicago Bar Association in paying tribute to the Justices of the Supreme Court of Illinois.

This occasion, coming at the end of the week of elections, permits me to remind you that it is the duty of every lawyer continuously to draw public attention to the judicial office. I refer to the necessity of not only an independent judiciary but a judiciary with sufficient tenure and security of office to interest the best lawyers in each community to accept nomination for judicial office. The necessity and public obligation include working for the election of these well qualified candidates after they have been nominated.

I do not wish to give the impression that I would approve of political chicanery to elect one man. I think that it is preferable to have a contest between well-qualified candidates and accordingly am somewhat suspicious of failures to nominate, cross-filing or its equivalent, the coalition ticket. Use of these devices deprive lawyers and other voters of their right to select their judges.

Better still is the plan proposed by the American Bar Association wherein an impartial commission would recommend the names of qualified lawyers to the governor of a state for judicial appointment. The voter would still retain the right and opportunity to pass upon judicial capacity of the appointed judge at stated intervals.

Pending wider adoption of the American Bar Association plan, one method which has been helpful in directing the attention of voters to the qualifications of judicial candidates is the lawyers' preference poll. This has been successful in a number of metropolitan areas because it is an educational device for all of the lawyers as well as the other citizens who vote within the area.

In my address at the Illinois Supreme Court dinner, one of the main points I stressed was our lack of a mechanism within the profession to give lawyers protection against a discourteous, arbitrary or bad-tempered judge. A judge who has forgotten that as a public official it is incumbent upon him to administer justice with proper judicial humility.

In my opinion, the position of the organized Bar should be that courts should be conducted in an orderly, courteous and dignified fashion with mutual respect between judge and lawyer and between counsel for the plaintiff and the defendant. The judge has the powers of his office. He can handle forgetful lawyers. Similarly, we should be able to devise a method of protecting lawyers from discourteous judges. We should be able to do this effectively within the profession.

I named a fourth city in the title of my page. This means Christmas with all its lights, delights and its deeper peaceful significance. For this day and the Season, on behalf of both the official family and staff of the American Bar Association and Mrs. Randall and my own family, I want to wish each of you and your families "A Merry Christmas".

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise, within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom which it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.**

The Rights of Servicemen Stationed Overseas

The American Bar ought not to be fooled.

In the October JOURNAL, Major Snyder says that day-to-day operation is the key to workability of the Status of Forces Agreement in England; and that the problem is largely one of human relations.

This is not so.

The problem is to develop what Thomas Reed Powell once described as the ability to think of *something* which is associated with *something else*—without having to think about that with which it is associated.

THE SOMETHING is: the Judge Advocate's job of getting an American representative (note it need not be an attorney) to attend the foreign trial of an American citizen.

THE SOMETHING ELSE is this: under the Selective Service Acts, the Status of Forces Agreement and its corollary—the Japanese Administrative Agreement—an American citizen may:

1. Be conscripted for military duty;
2. While serving involuntarily on military duty be sent to a foreign country;
3. While in a foreign country, *in an admitted duty status*, be surrendered to the foreign country for trial, where he, like Girard, may find himself
   - Without right to trial by jury
   - Without right to writ of habeas corpus
   - Without right to have the trial conducted in the English language
   - Without right to immunity from double jeopardy
   - Without right to a defense counsel equal in stature to the prosecution counsel.

Is it promoting this loss of an American citizen's basic rights which the Major has a "wholesome desire to make work"?

SHAME!

VOLNEY F. MORIN

Hollywood, California

Embezzlement by Lawyers a la Cozzens Is Unusual

From the last paragraph of the article by Mr. Edward J. Bander entitled "Woe Unto You, Novelists" in the September issue of the JOURNAL, I quote the following sentence: "How about a good honest thief of a real estate man a la Cozzens' Mr. Tuttle?"

Mr. Cozzens, of course, was putting some drama into his book. He apparently regards an act of embezzlement by a lawyer as being a dramatic episode. Just how he would feel about an embezzlement by a real estate man, I do not know, of course. Personally, I do not think anyone would be very impressed.

Looking at it this way, I do not see how any of us lawyers can complain of Mr. Cozzens. If his story argues anything at all, it argues that improper conduct on the part of a lawyer is out of the ordinary.

R. E. ALLEN

Los Angeles, California

A Dissenter on "Anatomy"

Although the enthusiasm displayed by Mr. Bander in his September article of the JOURNAL was admirable, I fail to share his confidence that the scribes of the "mass market media" will give the advocate a breather.

The recent accolades accorded the film version of Voelker's *Anatomy of a Murder* is illustrative of this strange malediction that haunts the Bar.

To the lawyer the picture more resembled an Australian tag wrestling match between Killer Kowalski and Gorgeous George against rascals Dr. Albert Schweitzer and Boris Pasternak. It was unbelievable.

It strained credulity to watch defense attorney Paul Biegler (James Stewart) tipping his forensic hat to kindly Judge Weaver (Joseph Welch) as a "real Judge", who then proceeded to run his courtroom like the promoter of a bull and bear pit. Apparently lawyer Welch went unconsulted as actor Welch hid or winked behind his gavel as the prosecuting attorney repeatedly put the Zvengali hex on witnesses at the three-inch range.

Biegler himself, trying a capital case sans documents, statements or references, showing open hostility to prospective witnesses during his pretrial investigation, operated as if all he knew about Blackstone was that it was a darn good cigar.

Finally, it was just too much to see Biegler and associate spending untold hours in the law library, poring over many a volume of forgotten legal lore, trying to ferret out that one case on "irresistible impulse". As you watched them struggling through the books, apparently one at a time, it was difficult to hide the thought that any first-year law student by looking under "I" in any law digest or descriptive word index, would within five minutes have had his brief case brimming with precedent.

But what is it about this lycanthropy of law and lawyer that succeeds in fooling all of the people all of the time? *Anatomy* is grinding to its twelfth week in Boston. Perhaps again it is like the wrestling match. A college

(Continued on poge 1244)

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American Bar Association Journal

the official organ of the American Bar Association

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect so far as possible, the objectives of the organized Bar of the United States.

There are eighteen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Family Law; Insurance, Negligence and Compensation Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral and Natural Resources Law; Municipal Law; Patent, Trademark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement and nomination by a member of the Association in good standing. All nominations made pursuant to these provisions are reported to the Board of Governors for election. The Board of Governors may make such investigation concerning the qualifications of an applicant as it shall deem necessary. Four negative votes in the Board of Governors prevent an applicant's election.

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Manuscripts submitted must be typewritten originals (not carbon copies) and must be double or triple spaced, including footnotes and any quoted matter. The Board of Editors will be forced to return unread any manuscript that does not meet these requirements.

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▲ *A phone that has push buttons instead of a dial for calling.*

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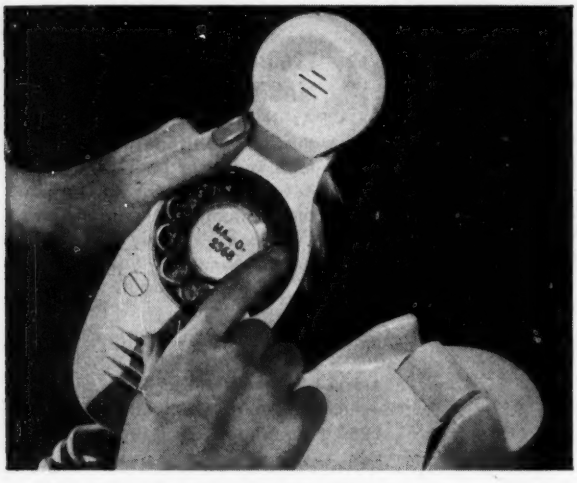

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BELL TELEPHONE SYSTEM

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championship final, as legitimate and realistic an adversary proceeding as exists under this sun of ours, is at best about as exciting as a chess game in San Francisco's Pacific Union Club, while the inanities of the Killer Kowalskis, Mr. Tojos *et al.*, would stir even the dean of a theological seminary to cheering, jeering, perhaps ripping up his program or tearing the back out of his arena seat, according to the tide of battle.

BARRY C. REED

Boston, Massachusetts

A Disagreement About Rouault's "Three Judges"

While no one can quarrel with Harold Porter's call for a strong and independent judiciary ("The Three Judges. . ." in September's JOURNAL), the aesthetic and artistic judgments he unfolds therein are certainly most controversial and much less acceptable. In fact, the more reasonable insight of one's own faculties as well as the weight of critical opinion are decidedly opposed to Mr. Porter's interpretation of the Rouault painting, "The Three Judges" which the article relies upon in support of its legal thesis.

Indeed, until Mr. Porter's recent flyer, the general aesthetic view of "The Three Judges" has been wholly and intensely to the contrary. Thus, the eminent French art critic Charpin-Raimu (a close personal friend of the artist) has in his privately printed *Les Arts pour les Artistes* found in this same painting the very personification of a wise, powerful and incorruptible judiciary. Where Mr. Porter imagines prejudice and moral deterioration, Charpin-Raimu (as well as the canvas itself) illumines an enlightened justice and charity for all. Where Rouault's Chief Justice demonstrates understandably compassionate concern for society's need to punish frailties that are all too human, Mr. Porter finds only trepidation and fear of public unpopularity. Venerable old age is translated by the author into decay; moral passion is transmuted (by some strange, introverted alchemy) into an unsympathetic hostility. Every obvious virtue is literally blackened into ominous vice. "Let not law sit in judgment upon art, and vice versa", cautions Charpin-Raimu, and we would all do well to follow suit here.

But let your own senses themselves be your trusted cicerone in art. Look again at the JOURNAL's black and white reproduction of "The Three Judges" (page 954) and see which of these views is closest to reality and sweet reason. Does not the center jurist with his wide-eyed countenance present to his courtroom a frank, receptive and responsive face, one in which mind and spirit are equally alert to awesome responsibility? Is this not the hallmark of judicial virtue? Does not his visage breathe the very essence of matchless knowledge and scholarship in the law, accumulated over a lifetime both on and (certainly) off the bench? Is not a tender humanity, a philosophic beauty born of his eternal balancing of the grave alternates of life and death, etched in that face? Does not a humble and just pride majestically bear the honorable trappings of judicial office? . . .

As plainly evident, the judge on the left displays not the "cunning corruption" Mr. Porter fancies, but rather the intense concentration of one mightily seeking a Solomonic solution to a complex legal quandary. And where can sustenance be found for the bare, unsupported charge of a "smug confidence . . . of prejudice" in the third jurist on the right? Rather, the artist here has fondly and becomingly represented the warm and friendly humor of one who through strength of character has not succumbed entirely to the heavy and onerous burdens of official responsibility; one who with Olympian detachment continues to see the irony of each lawsuit, the partisan hyperbole that sits on every litigant's shoulder; one who lightens the explosive controversy by the subtle insight of laughter at the cosmic truth of "What fools these mortals be!" May the tribe of such men increase!

But certainly the ultimate refutation of Mr. Porter's novel thesis is found in the very words of the artist Rouault himself. Writing to his friend Panurge,

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the Curator of Modern Art at the Sevastapol Museum, Rouault took pains to answer the charge that he was anti-legalistic in the following words:

> Bosh...it is the nonsense...a fantasy made up of the half cloth. Let critics be still, lest they repaint with their prejudices what my brush creates on canvas.

Could any indictment be clearer!...

ARTHUR STAMBLER

Washington, D. C.

Who Says There's No Delay?

I note in the current issue of the JOURNAL the article by Mr. Lawrence E. Mullally, of the Oakland, California, Bar, entitled "Let's End the Hullabaloo". I certainly have no objection to any member of the Bar believing and so stating in print that we operate with the best of all possible Bars and the best of all possible Benches in the best of all possible worlds. However, I find one statement on page 1040 which appears to me to be quite startling as follows—"Moreover, in the non-metropolitan areas where the larger proportion of litigation is handled, there does not seem to be any undue delay." While Mr. Mullally does not define what he considers a non-metropolitan area, his statement that in such area the larger proportion of litigation is handled is certainly not applicable here in Massachusetts. Our two big counties, which by any definition would be considered metropolitan areas, are Suffolk and Middlesex and between them in the year up to June 30, 1958, they tried on their law dockets in these two counties 1,955 cases, both jury and jury-waived, whereas in all of the other twelve counties put together only 1,430 were tried.

Not to go on at undue length—the same observation will be found applicable in New York where in the four New York counties plus Erie, of which Buffalo is the county seat, and Monroe, of which Rochester is the county seat, 5,195 out of a total of 8,599 cases were tried in the New York Supreme Court with and without jury. This is according to the last report of The Judicial Conference.

We find a similar situation in New Jersey. The counties of which Camden, Newark, Jersey City, Paterson and Elizabeth, all of which are certainly parts of great metropolitan centers, are the county seats, had 1,781 trials in their Superior and County Courts out of a total for the whole state of some 3,154 in the reporting period 1957-1958.

JOHN A. DALY

Supreme Judicial Court
Boston, Massachusetts

Why Police Officers Cite Crime Statistics

As a law enforcement officer turned teacher and, secondarily, as an attorney, I find myself conscience-bound to note an exception to some of the conclusions voiced in, "Let's End the Hullaboo: Two Self-Destructive Legal Myths" (Myth No. 2, Lawless America) October, 1959, issue.

Few law enforcement administrators in the country take any satisfaction in

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the tattoo of publicity alleging lawlessness in America. A bit of research, one might venture to suggest, would establish that a goodly part of the illusion of lawless America is a sociological by-product. Most law enforcement officers are practical men and not theorists.

Statistics are kept—and they certainly do not truly reflect the crime picture—primarily as an administrative tool for planning wherein lies their real worth. A little cross-examination of the underlying motives of police officers who cite crime statistics would establish, as the main reason, an attempt to regenerate in the minds of men the idea that law enforcement is everybody's business. It is not the sole responsibility of the police officer, for after all is said and done, he is just another member of a community who is being paid to do what all ought to do.

Any thoughtful law enforcement administrator, and there are many in that category, would prefer, by far, that kind of a response to statistics alleging increased crime trends. That would be priceless. The need for more and more manpower and equipment would be reduced substantially. There must be recognition that it is going to take more than paid police officers to achieve that end.

FRANK D. DAY

Michigan State University
East Lansing, Michigan

Too Many Unqualified Lawyers?

For the past several issues a distinguished Association member has been offering statistics and arguments to support the contention that the Bar is not overcrowded while several other members have been writing letters to the editor maintaining that the Bar is overcrowded.

On the basis of empiricism and not statistics, I should like to add my small voice to those of the several gentlemen who have been maintaining that the Bar is overcrowded. For some time I have had among my duties that of interviewing applicants for positions as attorneys in a government law office. It has been my disillusioning experience that there must be literally thousands and perhaps tens of thousands of attorneys in this country who are either unemployed, underpaid, extremely dissatisfied with their work, or both underpaid and dissatisfied. It has also been my experience that there must be a shocking percentage of attorneys in the country who never should have been permitted to graduate from law school, much less pass a bar examination.

Perhaps if those attorneys who ought not to be members of the profession had been eliminated at the beginning, it could more accurately be said that the profession is not overcrowded. However, that is not the situation.

My view, I may say, is shared by every other attorney in Washington whom I have met—and that includes a large number of attorneys who have among their duties the task of hiring attorneys.

MARION EDWYN HARRISON

Arlington, Virginia

Takes Issue with Mr. McDonnell

I would take issue with a letter recently published in your August, 1959, JOURNAL on page 784 entitled, " 'World Rule of Law' Means Scrapping the Constitution". Mr. McDonnell is of course entitled to his opinion, but I would point out that his argument in support of his criticism of Mr. Rhyne, Mr. Malone and the concept of "World Peace Through Law" appears to the writer as illogical and unjust.

I presume that Mr. McDonnell is a Catholic and a good one but his explanation of the Catholic social position on this matter is erroneous. If he would read the following documents, I am sure his viewpoint would change or at least he would in the future refrain from citing the Catholic Church as a supporter of his beliefs. These are: *On World Government and Religious Tolerance* by Pope Pius XII, Reprint No. 116, February, 1954; *Pius and Peace* by Alba Zizzamia, Reprint No. 123, January, 1955; *Moral Law on International Level Needs World Law* by the Very Rev. Msgr. George Higgins, Reprint No. 119, May, 1954; and *Our Bishops Speak on International Relations*, Reprint No. 122, December, 1954, all from *Catholic Action Reprints*, University of Dayton, Ohio. In reading these documents it is easily seen that a supranational juridical society is called for by Catholic social teaching and it by no means demands "Scrapping the Constitution". In fact, Catholic teaching insists that internal sovereignty of each member nation in the family of nations be retained. Catholic social teaching supports world peace through law.

It is true that the family is the basis of society but just as the formation of a national state does not destroy the family, neither does the formation of a family of states, the supranational juridical society, destroy the nation or the family. Reprint No. 122, page 5, leads us to the conclusion that the Connally Reservation would have to go since no nation may in justice be the judge of its own case. The writer is a Catholic and is dismayed in finding that non-Catholic Rhyne's "good works" are attacked by one who should

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be supporting his ideas and actions.

As for the Pershing argument, how can Mr. McDonnell argue from the fact that since in wartime the different allied armies are more successful if they fight as separate units to the conclusion that an international society under law is foolish? The conclusion is illogical even if the premise could be proven to be true.

Maritain's *Man and the State* and Adler's *How To Think About War and Peace* present the natural law case and the case from reason for world political society. May Mr. Rhyne's worldly charity find more supporters in this age of world cooperation or world annihilation.

WILLIAM R. DURLAND

Springfield, Virginia

Thanks to an Attorney

I am not a student of law, and I am not a member of your Association. I am just a client who wishes to express a rather simple, fundamental appreciation to one of many good lawyers.

There was recently occasion for me to consult an attorney, and I called Mr. ————, of Eugene, Oregon, for aid. It was the kind of situation which could have very easily developed into a serious battle between parties and between lawyers... Mr. ———— handled the entire situation with tact, professional skill, and with a fine sense of propriety. The whole problem could have been emotionally painful and financially expensive for both parties, but instead it is now resolved—thanks to Mr. ————. It is as a direct result of his professionalism that I maintain a high respect for the profession of law.

ROBERT MONAGHAN

Eugene, Oregon

He Was Not Amused by Federal Employees Article

We have read the article "Mr. Smith (GS-14) Goes to Washington: Our Budget and How It Grows", written by John D. Garwood, a Professor of Economics at Fort Hays State College, Kansas, for the September, 1959, issue of the AMERICAN BAR ASSOCIATION JOURNAL.

This article is presented in an editorial foreword as "an amusing" example of why the Federal Government has increased its spending approximately seventy times during the past forty years. The article places the blame (amusingly, of course) upon a mythical Joe Smith, a GS-14 employee. The point of the article is the old and weary one that Joe Smith, eager for personal aggrandizement, inflates the budget needs of the particular office he supervises—and that this process is duplicated throughout the federal service by thousands of Joe Smiths. "Thus," the article states, "the Director of the Budget, the President, and Congress as the final arbiter of the budget are at the mercy" of these empire-building career employees.

Whether or not this is an amusing presentation may be subject to question. That it is a naïve, inaccurate and misleading one is clear enough.

The budget of the federal Government has increased because of the expanding needs of an expanding nation, and directly because of legislative enactments and Executive Orders. Federal employees carry out policies, they do not make them. The major portion of the federal budget is devoted to defense needs. Of the 2,300,000 Federal employees, 23 per cent are in the Post Office Department; 17 per cent in the Department of the Army; 15 per cent in the Department of the Navy; 13 per cent in the Department of the Air Force; and 8 per cent in the Veterans Administration. These agencies constitute 76 per cent of all federal civilian employment; the remainder are distributed in more than fifty departments and agencies, serving various vital research, investigatory, conservation, protective, legal, health and other needs.

The fact is that while both the expenditures of the Federal Government and its immense responsibilities have grown, the number of employees has failed to keep pace in many cases. Some agencies are seriously understaffed, and the Civil Service Commission has difficulty in recruiting employees for many vital tasks.

The picture drawn by Professor Garwood of the entrenched bureaucrat who, he writes, makes spending decisions "more far-reaching than those of John F. Gordon, president of General Motors, world's largest corporation," is a phantasy which is neither amusing nor factual, semi-serious or otherwise. His statement that "Thus in the United States today Joe Smith (GS-14) rules supreme" is a surprising one to find in the AMERICAN BAR ASSOCIATION JOURNAL, even under the dubious guise of wit. His concluding comment that "Although Smith and his neighbors do not recognize him as such, he is 'top banana' in the country's economic life," is a comment chiefly significant for the light it casts upon the viewpoint of the author.

The rapier wit of Professor C. Northcote Parkinson, discoverer of Parkinson's Law, has been a delight to many career employees, who, like most Americans, have a fondness for humor even at their own expense. But the heavy-handed essay of Professor Garwood is quite another matter.

VAUX OWEN

National Federation of Federal Employees
Washington, D. C.

Mr. Jefferson and the Konigsberg *Case*

While thumbing through a volume called *Jefferson's Letters*, arranged by Willson Whitman, and published by E. M. Hale and Company, of Eau Claire, Wisconsin, I found the following letter which appears on page 80:

To Mr. George Wythe

Paris, Sept. 16, 1787

The world is going all to war. I hope ours will remain clear of it. It is already declared between the Turks and Russians, and considering the present situation of Holland, it cannot fail to spread itself all over Europe. Perhaps it may not be till next spring, that the other powers will be engaged in it; nor is it yet clear how they will arrange themselves...

You ask me in your letter, what ameliorations I think necessary in our federal constitution. It is now too late to answer the question, and it would always have been presumption in me to have done it. Your own ideas, and those of the great characters who were to be concerned with you in these dis-

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(Continued from page 1252)

cussions, will give the law, as they ought to do, to us all. My own general idea was, that the States should severally preserve their sovereignty in whatever concerns themselves alone, and that whatever may concern another State, or any foreign nation, should be made a part of the federal sovereignty; that the exercise of the federal sovereignty should be divided among three several bodies, legislative, executive, and judiciary, as the State sovereignties are; and that some peaceable means should be contrived, for the federal head to force compliance on the part of the States.

This letter by Thomas Jefferson had taken on an especial meaning after I read the article by the Honorable Charles H. Davis, entitled "Constitutional Law: The States and the Supreme Court," which appeared in the JOURNAL for March, 1959.

What was especially interesting about Jefferson's letter was his explanation on the question of the relationship between the States and the Federal Government. And Judge Davis' article centers about the same question! It was really thought-provoking when reading the sub-heading, "State-Federal Relations in the Right To Practice Law," on page 236. Since the practice of law requires a license from the state, and furthermore, since admission to the State Bar is a prerequisite to admission to practice in the federal courts, isn't it reasonable to infer that the matter of licensing lawyers to practice is a matter which concerns the states alone? As Judge Davis' article refers to the dissenting opinion in the *Konigsberg* case: "The case involves an area of federal-states-relations—the right of states to establish and administer standards for admission to their bars—into which this Court should be especially reluctant and slow to enter", and "What the Court has really done, I think, is simply to impose on California its own notions of public policy and judgment. For me, today's decision represents an unacceptable intrusion into a matter of state concern."

I was really impressed by the article, and the thoughts which it related certainly were reminiscent of the ideas embodied in the interesting letter by Thomas Jefferson, as quoted above.

MARIE F. PETROCELLI
Brooklyn, New York

Exchange Scholarships for Law Students

Exchange scholarships for students interested in the laws and legal systems of the world would, in my judgment, be a most effective means of bringing about better international understanding. Our Association should seriously consider such a program and establishment of a fund for that purpose.

Former Association Presidents Rhyne and Malone and President Randall have made for us a brave start toward a plan for peace. Let's help them in a most important and direct manner. The early establishment of a fund for providing American Bar Association scholarships for our deserving youth interested in the law and in world peace should lead to harmonious relations abroad at the level of the law. Law study in the United States by foreign students while our own scholars study abroad upon an exchange basis similar to the Rotary Club Fellowship will hasten general realization that legal processes provide the only certain route to settlement of the disputes of nations.

The law has already advanced over land, the seas, into airspace, outer airspace and now reaches toward problems of interplanetary nature and of the universe. We have not yet perfected one of these systems. Our problems grow more and more complex and time is rapidly running out.

We of the American Bar pledged consecration to the task of implementing a peace program while participating in 1957 with the British Bar in seminar and ceremony at London and at Runnymede, the site of Magna Charta. Now the nations have need of a new Charter for "World Peace Through World Law"—to adopt the slogan of Clark and Sohn.

Our youth can help show us the way if we as lawyers will adopt a cooperative program of action.

CAMERON SHERWOOD
Walla Walla, Washington

Professional Economics: A Provocative Article

The following excerpt from a recent issue of *Life* magazine (November 2, page 84) seems both illuminating and provocative on the current subject of professional economics:

> A 1956 survey by the magazine "Medical Economics" showed that half of all the self-employed physicians in the nation netted more than $16,000 a year. Of the specialists, half netted $18,000 a year or more. Acquiring an M.D. is the surest road to financial success, not to mention community prestige, that our society provides. The typical doctor earns considerably more money than the typical lawyer or engineer, and far more than the average teacher.
>
> Is he worth more than these people? In terms of abstract justice, probably

not, although the average doctor's earning period in life is shorter than that of many other men. Essentially, doctors make a lot of money because there are not enough doctors to go around. There never have been enough and as far as anyone knows there never will be.

Only a small number of people can ever be physicians. A young man who aspires to be a doctor must be a glutton for work: a medical student must study twice as hard as the average college student. He needs patience and money: a medical education usually takes 10 years and is likely to cost at least $15,000, after which the young physician must spend an initial $3000 to $4000 to equip his office and about $9000 a year to run it. His expenses include perhaps as much as $500 a year for insurance against malpractice suits; the insurance is expensive because juries in malpractice cases usually think doctors are even richer than they are.

The doctor also needs something else: guts. Not every young student likes to spend a year cutting up a human cadaver. Not every adult can stand the physical strain of the doctor's long hours or the emotional strain of a job in which even a routine childbirth may unexpectedly erupt into a fountain of blood that will then be his sudden, fearful and lonely responsibility to stanch—and may end in his having to go to the waiting room and break the news to the expectant father that his wife and child have died.

Even so, there are more applicants for the job than our medical schools can handle, now or in the foreseeable future. About 15,000 young men and 1,000 young women try to get into medical school every year, and the 85 U. S. medical schools can take only 8,000.

STANLEY H. BORAK
New York, New York

Thanks Mr. Borsos—We're Trying

Is it my imagination or is the JOURNAL actually making an effort to be more interesting reading for some of us small town boys in general practice who seldom, if ever, have exotic cases on a national or international level?

After having fallen into a bad habit of merely scanning the JOURNAL each month for the past several years, it was with considerable surprise and pleasure that I read a recent issue from cover to cover.

ROBERT L. BORSOS
Kalamazoo, Michigan

One Lawyer's Dissent:

American versus English Arguments

by **Robert Ruppin** • *of the Pennsylvania Bar (Lancaster)*

Mr. Ruppin begins by quoting at length from remarks of a late Vice Chancellor of New Jersey, made half a century ago, comparing English and American appellate practice. The Vice Chancellor believed that on the whole the American appellate practice was superior to that of the United Kingdom. Mr. Ruppin believes that this is no longer true. The attitude of many American judges toward the Bar is wrong, he writes, and the severe time limitations placed on oral argument of appeals works a substantial injustice in many instances.

Some time ago, while looking through the outdoor bookstalls opposite the Federal Court House in Philadelphia, I noticed a small volume with the title "Henry C. Pitney, Vice Chancellor of New Jersey, April 9, 1889—April 8, 1907". (Not to be confused with the late Mr. Justice Mahlon Pitney of the Supreme Court of the United States, who was Chancellor of New Jersey from 1908 to 1912.) Turning the pages of this little book my attention was drawn to some remarks of the Vice Chancellor near the end of a speech he made in acknowledging a gift from the Bar on his retirement. These remarks dealt with the difference between the American and English Bars, and particularly with the difference between the appellate systems in the two countries. The subject being of great interest to me, I took the book along home.

Judge Holtzoff's very interesting article on English Appellate Procedure had previously appeared in the March, 1958, issue of the JOURNAL, and afterward an excellent article by Mr. Cutler, "The Value of Oral Arguments" appeared in the JOURNAL (September, 1958, issue).

It hardly needed these articles to persuade me that this was a subject of great interest to all practitioners. Conversations with lawyers over a period of many years indicated that no subject was of greater concern to the average lawyer than the matter of oral and written arguments, especially before the appellate courts, and the courts' methods of dealing with them.

I think Chancellor Pitney's remarks are sufficiently provocative to be worth repeating, so I shall quote them here at length. At the end I shall take the liberty of adding some reflections of my own. In reading these remarks of the Chancellor it is to be remembered that he made them extemporaneously at a dinner given in his honor on the occasion of his retirement, after eighteen years on the Bench, during which he achieved for himself recognition as one of the great American judges.

> ...the difference between the English Bar and our Bar is this, that the labor of the American barrister is a great deal heavier than that of the English barrister in that the former has such a wide field of authorities to go through. The leading English barrister often has a young briefless barrister, who is ambitious and has money to live on, to work for him, called a devil. The barrister has a great brief handed to him—and the brief there is not what the brief is here: it is a history of the case, a statement of the facts, and all that sort of thing. Well, that barrister is a fifty or one hundred guinea man; he doesn't open his lips unless well paid. He has not time to study all the brief and hunt up the law—although the range of authority is small as compared with ours—so he hands that over to his devil. The devil goes to work and hunts up all the authorities for him and receives no other compensation than his own personal improvement as a lawyer. And then the great barrister never prepares and takes into court any such arguments as you do here. You will see the great barristers there go into court with three or four sheets of paper pinned together at the corners and their whole argument is made from that.
>
> You will find in the reminiscences of Sir Charles Russell, afterwards Lord Russell of Killowen, facsimile reproductions of arguments, notes of famous arguments, all on note paper.
>
> I sat in the House of Lords two or three days waiting to hear Sir Charles Russell argue a case—waiting for his turn to be reached—and when he rose to speak he had three or four sheets of paper pinned together. "Now", he says, "My Lords"—they all sat around, each in a great chair with a little table before it, and every one had a good-sized blank book where he took notes of argument—he commenced: "Now, your Lordships, I make so many points in this case. My first point is so and so"; and then he looked around to see when they had all written it down and waited until it was all down before he would

Robert Ruppin was admitted to the Bar in 1921. Born in New Jersey, he attended public schools in Lancaster and Akron, Pennsylvania, and attended Pennsylvania Military and Franklin and Marshall Colleges (A.B. 1918). He received his legal education at Harvard and in the office of a Lancaster lawyer. He is a former city solicitor at Lancaster.

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go on. "My second point, your Lordships, is so and so"; and looked around to see that every one of them wrote it down. "My third point is so and so". When he got through with that preliminary he began to talk a little, then the judges began to talk. It was then a mere conversation across the table between gentlemen; that is all, and that is the ordinary style of argument over there.

And English judges, except in the House of Lords—all the judges in the intermediate courts—are expected in more than ninety-nine out of a hundred cases, to deliver their judgments at once; and during the argument the authorities are brought in and examined. Nobody is in a hurry. You would suppose there was never to be another cause argued. Limitation of time for argument is something that would be considered—well, I don't know how to characterize it. You all know what I think of it. But I want to say to you that in England the counsel limit themselves. They are paid to make their argument, and when they are through they quit and the quicker they can get through the better for them; and I assure you that a lawyer in those courts that doesn't talk to the point finds it out very soon. The court has a way of indicating very plainly when counsel wander and waste time.

I received a very fine compliment this morning from your first speaker about some oral opinions that I don't think I deserve. The English judges are expected to decide at once and this practice affects the character of their opinions. They are not such fine opinions as we get in this country. The English judges don't have time or opportunity to consider their cases except in the courtroom during the argument; the books are brought in before them; they stop the argument while they read the cases. That plan has its advantages in the way of expediting business, but its disadvantage is that the judges don't have time or opportunity to put their reasons carefully in writing, and it means a great deal of loose language, in a sense, inaccurate language, used by those great English judges. But they are all highly educated and drilled men; they are all drilled to think and talk like a book, and it is perfectly wonderful to hear them deliver oral opinions. They are admirable; but the results are not equal to the best opinions in this country, nor are their arguments equal to our arguments, because they are oral, they are offhand, and they have not studied the case as our lawyers study them.

I was once with a lawyer in London talking and I remarked: "You have got great barristers here that can talk like a book, but there are some scrawny fellows in the United States who can hardly speak that will print an argument that will beat your best". That is where the Bench of the United States has a decided advantage over the English Bench. It is that you are compelled by the rules of the court to print your arguments as well as your case, and the result is that there is a more thorough examination of every case, as there ought to be with such a variety and great scope of conflicting thoughts from different states in this country. It follows that our Bar is in a sense a higher class here than in England and the Bench is in a sense a higher class than in England. But the English Bench is made up with the utmost care and they are the ablest men undoubtedly, or they would not be able to do the business. They receive high salaries, so that the very greatest and strongest-minded lawyers seek positions on the Bench.

The English courts are able to accomplish much more business in the same time than ours. But why? One reason I have already given. In almost all the cases they give the case but one consideration. Another is that a cause is never postponed on account of the absence of counsel. The court there is like the car of Juggernaut. When a cause is reached it travels right over it and if the senior counsel is not present the junior counsel must do the best he can. The argument and consideration proceeds. Another reason is that a great many steps in an English cause, especially on the equity side, which in our courts come before the judges, are decided over there by a class of judges called chief clerks who are a sort of understudy to the regular judges, so that the latter spend their time wholly in disposing of the very merits of the case, and the lawyers find it to their interest to present those questions as briefly, as rapidly, and as carefully as they can.

But while it is true that the English judges are able to dispose of more business in the same time than our courts can, with great respect, I do not think they do it as well.

As I have intimated, we must look at these remarks in the light of the occasion on which the Chancellor made them and the audience to which he made them. Perhaps it was true then that the English opinions were "not equal to the best opinions in this country", and that the English arguments were not equal to American arguments. I doubt whether it is true today. On the whole I think that during the last fifty years little has been added to the law by American judges in the way of science or literature. Yet judicial opinions continue to pour out in seemingly endless volume. Our reports, state and federal, become more and more encumbered with long, diffuse opinions, many of them loaded with long lists of citations, relied on for general statements, most of which are not in point—partly the result, I suspect, of the law clerk system.

If our American opinions today are not convincing, if our decisions are not, in many cases, based on understanding of and adherence to the precedents, without which our whole system will fall, there are many reasons for it. Foremost, of course, is the congestion in our courts. Then there is the personnel of the judiciary. I should like to write about these at another time. But one of the main reasons for dissatisfaction with present-day judicial decisions is, I am convinced, the inadequacy and ineffectiveness of the arguments of counsel which precede them. This is definitely not the fault of the lawyers. It is the result of hamstringing and

harassing them by unrealistic time limits on arguments, by frequent interruptions and comment from the bench, and indications, often ill concealed, of judicial impatience or boredom. There is something inherently wrong with a system which, in so many instances, results in a sense of frustration, depression and often chagrin in a lawyer who has just argued a case. And this I know to be true, from conversations with lawyers over a period of almost forty years. It is based usually on a feeling that the lawyer has not been able to present his client's case adequately and often that the court has not apprehended the actual points involved.

In most cases oral argument is worse than none because it results in the formation of "on the spot" opinions, which it is very, very hard to change. Judges are in favor of it, because it saves them from reading the record, or at least it serves as an excuse for not doing so. I too am in favor of oral argument, but not under the conditions imposed by American courts.

I think a modification of the English system would be well worth trying. When a businessman, doctor, lawyer or just a plain political ward-heeler is elected to Congress, he immediately becomes, *ipso facto*, an authority on international affairs, military affairs, finance, agriculture, economics, etc., etc.—at least he assumes so. When a lawyer is elevated to the bench, it is assumed—by himself and other judges —that he is an authority on all branches of the law. He may never have tried a case—and that is by no means an infrequent situation—yet forthwith he knows more about trial practice and trial evidence than all the lawyers who come before him. Appellate judges, one would think, know everything about everything. If American judges could bring themselves to drop the attitude of a teacher toward pupils, which so commonly possesses them, and to realize they don't know more about a case than counsel who have studied and worked on it long and diligently, the stage would be set for better arguments, better opinions and better and more just decisions. Arguments would then tend to become, as Chancellor Pitney said of the English arguments, conversations between gentlemen.

The most outrageous perversion of oral arguments lies in the time limitations put on them by almost all appellate courts. Chancellor Pitney said that "the English courts are able to accomplish much more business in the same time than ours", and Judge Holtzoff said "It may seem strange that lack of a limitation on the length of the argument does not lead to an unnecessary consumption of time."

Yet we have a phobia about unlimited arguments. It is not only the time-saving feature that is important, it is the element of justice. In many of the cases which come before our appellate courts today it would be impossible for anyone, even with the gifts of a Hamilton or a Lincoln, to adequately argue them in, for instance, the half hour allowed by the highest court of my state. This is especially true when arguments are interrupted by frequent questions or by remarks from the bench which take away the lawyer's time and interrupt his train of thought, and most of which violate those wise precepts of Bacon: "It is no grace to a judge first to find that which he might have heard in due time from the bar" and "An over-speaking judge is no well-tuned cymbal."

I should like to see an American court of last resort have the courage to do away with the present system. I would suggest that instead of printing the record and the careful, often elaborate briefs now submitted, there be submitted to the court in advance a statement of the questions believed to be involved (typewritten), with perhaps a memorandum of any authorities counsel would like the court to look at, then have oral argument at which court and counsel would sit around a table, bring the books in if necessary and argue the case out thoroughly. Then, if desired by court or counsel, the record could be printed *afterward*, with briefs. In that way questions raised on the oral argument could be carefully considered and fully answered in the briefs. Some doubts raised or positions asserted by the judges could be answered and perhaps shown to be untenable or irrelevant, and counsel would at least have the satisfaction of feeling that everything had been done for the client that could be done. It is quite likely too that after oral argument in many cases it would not be necessary to print the record or submit briefs, again saving much time and immense sums of money. I would not favor immediate, extempore opinions, in the English manner.

I do not know whether such a system would alleviate or increase the congestion in some of our courts. Congestion does not exist in all courts, you know. The late President Judge Keller of the Superior Court of Pennsylvania, himself a hard-working judge, used to love to quote Mr. Dooley, to the effect that "I have the judicial timperamint—I hate worrk." From long years of observation I have the feeling that this is not the least of the elements contributing to the congestion in some courts. But whether it is necessary to improve the personnel of the courts or to create more courts or more judges, or whether it is necessary to revise our appellate procedure, American lawyers, I am sure, have the feeling that in most of our courts—appellate and of first instance—the system of arguments, oral and written, leaves much to be desired.

In closing I must refer to a passage in Bellamy Partridge's *Country Lawyer*. The author, himself a lawyer, says that an eminent New York state trial lawyer once told him that in his early days at the Bar he took appeals only in those cases he was sure to win. The result was that he won about 50 per cent of them. He changed his tactics and appealed every case he had lost below. The result was the same. He won 50 per cent. He said that usually the appellate court found some reason for sustaining him which he had not advanced when he won, and based its opinion on some reason not advanced by his adversary when he lost. Every lawyer who has had extensive appellate experience must have had pretty much the same results. Is this not food for thought for all of the profession?

Government by Anonymity:

Who Writes Our Regulatory Opinions?

by Louis J. Hector • *of the Florida Bar (Miami)*

When he was appointed to the Civil Aeronautics Board two years ago, Mr. Hector writes, he was surprised to learn that the commissioners in most federal agencies do not write their own opinions, and that few of them have ever done so. Furthermore, no one knows who does write the opinions, many of which have a great influence on the lives and fortunes of American citizens. Mr. Hector explains how this situation came about and examines the dangers which he believes are inherent in this administrative anonymity.

Shortly after the first of this year, the House Legislative Oversight Subcommittee issued an interim report on the independent regulatory agencies.[1] The report has received far less publicity than some of the sensational testimony unfolded before the Committee, and this is unfortunate. For the Oversight Subcommittee under Chairman Oren Harris did not limit its investigations to individual improprieties in the proceedings of the regulatory agencies. It investigated also the basic organization and procedures of the agencies, and its recommendations for organizational changes are well-considered and important. Some of them, indeed, are so far-reaching that they would work a significant revolution in our federal regulatory procedures.

The most revolutionary recommendation in the Harris Committee report seems on its face quite innocuous. It is simply that members of the regulatory agencies should be required by law to write their own opinions, or at least to supervise personally the writing of their opinions.[2]

Most people, I am sure, believe that commissioners already do this. After all, that is supposed to be their job: To make decisions and to explain in opinions why they made those decisions. I, like most other citizens, certainly believed this when I was asked to become a member of the Civil Aeronautics Board two years ago. But the simple fact is that it is not so. Few commissioners have ever written their own opinions, almost none do now, and they probably never will unless Congress compels them to.

The average citizen is not alone in his surprise when he first learns of this state of affairs. A Supreme Court Justice once said to me that he had always assumed that commissioners, like judges, write their own opinions and that he was greatly surprised when he found out that they do not.

This is no mere matter of technical niceties or internal governmental procedures. The regulatory agencies of the Federal Government are among the busiest decision-makers of our time. They issue decisions every day regulating business transactions which involve many millions of dollars, which affect the lives of thousands of employees of the regulated industries, and—most important of all—which set the rates and the standards for critical transportation, communication and power services furnished the American public.

The decisions of the independent regulatory agencies, at least in important cases, are always accompanied by opinions explaining the reasons why the agency acted as it did. But these opinions are very different from court decisions or other familiar important government documents. In the first place, agency opinions contain almost no clear statements of general principle. They are almost always enormously long and filled with facts and statistics, but the reader usually looks in vain for a statement of the basic principles on which the case was decided and on which similar cases presumably will be decided in the future. That is why almost no one reads them except the losing litigants who are seeking grounds for appeal and the judges of the appellate court who must decide these appeals. Since they never seem to come to grips with the real problems and policy issues involved in federal regulatory activities, they are of little interest to anyone else.

But an even more important differ-

1. House Special Subcommittee on Legislative Oversight, Independent Regulatory Commissions. H.R. Rep. No. 2711, 85th Cong., 2d Sess. (1959).
2. *Id.* at 14, 41.

ence between our administrative opinions and court decisions is this: *In most cases, no one knows who wrote them.* Not only the general public, but even the litigants and those most directly concerned in a case do not know who wrote the opinion which purports to explain why the case was decided as it was. True the opinions are always signed by several public officials. But nevertheless, neither the litigants nor the public know who really wrote them.

It is not that these opinions are of little importance. The ICC, for instance, has permitted the railroads to increase passenger fares to such high levels that they seem to be trying to force the American people to drive or fly instead of ride the trains. The CAB, on the other hand, has denied the airlines the right to increase their passenger fares as much as they would like despite the claim that this will cause our country to fall behind in the development of jet air transportation. The FPC in a critical decision some years back held that it did not have the power to control the pricing of natural gas at the producer level. The FCC has refused so far to permit pay-as-you-go television. These are momentous decisions which affect every citizen. And yet we do not know who wrote the opinions which justify these decisions. Only one thing we do know: The men who signed them, the men who have the responsibility for deciding the cases, in all probability did not write them.[3]

The Legislative Oversight Subcommittee proposes to change all this, and to make the decision-makers frame their own opinions. It is a drastic proposal. But I am convinced that it is sound, and indeed that it is indispensable to the survival of our federal administrative agencies as healthy, responsible public bodies.

Our Governmental Traditions

Viewed in the context of our American governmental traditions, the Oversight Subcommittee proposal is not really revolutionary; it proposes merely to bring the federal regulatory agencies back in line with American democratic traditions.

The history of our government is not told in a series of anonymous documents. Everyone knows, for instance, who wrote the Declaration of Independence. It was Thomas Jefferson. The other members of the Committee of Five—Adams, Franklin, Sherman and Livingston—asked him to "undertake the draft" because of his "happy talent for composition" and his "peculiar felicity of expression", as John Adams described it.[4]

We know who wrote other momentous statements of American national policy such as the Supreme Court opinions in *Marbury* v. *Madison*[5] and the *School Integration* cases.[6] No one had to suggest to John Marshall or to Earl Warren that he "undertake the draft" of these basic statements of constitutional principle. Each man was Chief Justice when the case came before the Court. Recognizing the momentous character of the questions involved, each chose automatically to write the opinion of the Court himself.

We have no doubt who wrote the opinion in the *Dred Scott* case.[7]. For better or for worse, this was one of the momentous court decisions in American history, and the Justices of the Supreme Court well knew it. Each one of them—nine in all—wrote his own opinion explaining just why he voted as he did. On such an important matter, each Justice felt that he personally, and only he, could explain the reasons for his vote.

These historic documents are not in themselves what one would call "action papers". Rather they were carefully reasoned broad statements of policy which accompanied specific orders or directives and which set forth as clearly as possible the reasons why the specific action was taken.

The actual Resolution of Independence breaking our bonds with Great Britain was approved by the Continental Congress on July 2, 1776, two full days before the Declaration was signed.[8] Yet not without good reason, Americans have always celebrated July 4 as the anniversary of our independence, because that was the day on which the founders set forth the doctrine of human rights which made our independence necessary.

In the case of our great Supreme Court decisions, the specific facts and the specific action explained by an opinion are often promptly forgotten. The personal fortunes of Judge Marbury and Dred Scott—the actual practical outcome of their cases—are lost in the minutiae of American history. But their names survive in the titles of opinions which spelled out broad constitutional principles which their personal legal problems happened to involve. As for the *School Integration* cases, how many of us remember the name of Oliver Brown or remember that it was he who wanted to go to a white school in Topeka, Kansas? Yet how few of us there are who do not well know that the Supreme Court has said that racial integration in public schools shall proceed "with all deliberate speed".

It is often thus in history. The opinion or the statement of general principle—and not the specific action taken—is the force which shapes the future. When a member of a regulatory agency makes a decision and then leaves the opinion-writing to someone else, he is neglecting, I believe, the most important part of his job.

Thomas Jefferson, and the other founding fathers of our country, well knew how important it is for government officials to state the broad general principles which underlie any important action they take. Or as the "happy talent" of Jefferson expressed it, there is an obligation to "declare the causes which impel them" imposed upon governments by "a decent respect to the opinions of mankind".

The right of citizens to know why the men who run their government take important actions may well be the most critical condition for the preservation of democratic government. Governments are run by men, not by self-enforcing laws. But the thrust of

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3. The independent federal regulatory agencies discussed here include Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, and Securities and Exchange Commission. These are the major independent federal agencies regulating important segments of our economy. The Federal Trade Commission, whose procedures were also examined by the Oversight Committee, already assigns responsibility for preparing opinions to individual commissioners, and the opinions appear under their individual names.
4. Becker, THE DECLARATION OF INDEPENDENCE 136, 194 (Vintage Ed., 1958).
5. 1 Cranch 137 (1803).
6. *Brown* v. *Board of Education*, 347 U. S. 483 (1954).
7. *Scott* v. *Sandford*, 19 How. 393 (1857).
8. Becker, *op. cit*, *supra* at 3.

democratic government is always toward bringing the actions of the men who run the government into ever closer conformity with the laws and the general policies of the community. Human beings, by their nature, will always tend to be careless and prejudiced. There will always be some who are corrupt. Democracy provides a check against these human weaknesses by requiring that government officials explain to the citizens why and how they make their decisions. It is under a system where men do not have to explain their actions that carelessness and prejudice, and even corruption, grow and flourish.

Even in the best of systems, of course, the explanation that a man gives of his conduct will often be incomplete; it will often be inarticulate and sometimes misleading. But a government official is far more likely to regulate his conduct by law and principle under a system where he must give some public explanation than under a system where he is not obliged to give any reasons at all.

Explaining Government Action

Our Federal Government proceeds from day to day with an overwhelming torrent of explanations of their actions by government officials. From the time a man first aspires to nomination for public office, he starts explaining not only what he hopes to do if he is elected, but also in great detail, why. Our Presidents usually take office with a detailed governmental philosophy already outlined to the public. Once in office, they feel impelled to explain in speeches, messages to Congress, veto messages, preambles to executive actions, and countless other official communications the reasons for every action they take. Senators and Congressmen feel it their duty to explain their actions frequently and fully both to their constituents and to their fellow legislators.

The judiciary, of course, has developed the practice of explaining its decisions to a high and formal art. Our appellate courts, and now to an ever-increasing degree our primary courts, take no important action without an accompanying opinion. In fact, courts have written opinions for so long and this has become such an integral part of our judicial system that we often forget there is no legal requirement either in the Constitution or in the statutes compelling our federal courts to give the reasons for their decisions. It is unthinkable that they would not do so, however. Severe as is the criticism often directed against the Supreme Court because of its decisions on controversial constitutional matters, the criticism would be far more general and many times harsher if the Court did not in careful detail explain the reasons for its actions.

In some courts, indeed, every judge states at length his own reasons for his vote. A legal decision by the British House of Lords will often consist of as many opinions as there are judges sitting. Our own Supreme Court usually hands down what is known as the "Opinion of the Court", but this is an opinion written and delivered publicly by one individual Justice in which a majority of the other Justices concur. If a judge does not agree with the majority, he writes a dissent. If he does agree with the majority but for different reasons, he writes a concurring opinion.

The framers of our Declaration of Independence included many lawyers who were familiar with the British judicial system and its practice of carefully elaborated opinions. Surely this is a part of the background from which emerged the ringing phrase "a decent respect to the opinions of mankind".

Our Government in its various branches has by and large maintained this "decent respect to the opinions of mankind", but that respect seems to be weak today in the federal administrative agencies. The members of these agencies should carefully consider whether this is not one of the basic reasons why mankind in turn does not seem at the moment to have a very profound respect for them.

The Regulatory Agencies Today

Superficially, the federal regulatory agencies would seem to have not too little, but rather a highly exaggerated respect for the opinions of mankind. The opinions purportedly explaining their actions issue in an overwhelming torrent. But on closer inspection, these opinions prove in most cases not to be real explanations of why a man or a group of men decided a case in a certain way, but rather long, impersonal documents, prepared by anonymous staff members and processed upward through the agency by an intricate machinery of clearances which has squeezed out of them all personality, life and individuality. Somewhere in this process the personal human thought of the individual agency members who decided the case has been irretrievably lost.

The impersonal opinions prepared in our administrative agencies by professional staffs completely screen the actual thoughts of the men making the decisions. Only in the case of a dissent or in the rare case of a concurring opinion does the general public or even the regulated industry get a glimpse of the thinking of the men controlling

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their destiny. From some agencies they are not even accorded these few tantalizing glimpses, for the same opinion-writers who prepare the opinions for the majority prepare the dissenting opinions as well.

Lawyers practicing before our federal administrative tribunals have said to me that they often feel they live in an unreal shadow world. A case is tried, perhaps for several years, before an examiner who actively participates in the detailed shaping of the issues and who controls and directs the presentation of the evidence. When the trial is over and briefs have been filed, the examiner studies the evidence and the briefs and then files an opinion which he himself has prepared. This gives in detail his conclusions and the reasons for them, and recommends to the agency what action should be taken in the case.

After the examiner's decision has been filed, a second type of proceeding starts. Long lists of exceptions to the examiner's report are prepared, lengthy briefs in support of these exceptions are filed, and finally as the climax of the whole process, attorneys for the litigants appear for oral argument before the members of the agency who will ultimately make the decision.

After the oral argument before the agency members everything is wrapped in obscurity. Sometimes a year goes by before anything else happens. Then one day a lengthy anonymous document is issued, known simply as "Opinion", accompanied by various orders, certificates or other directives. There is no indication of who wrote the "Opinion". No one knows how it was drafted or reviewed. Seldom can anyone detect in it the personality or thought of any of the commissioners who were charged with making the decision. It is just there—a long, anonymous, impersonal document.

It is small wonder that litigants and attorneys faced with this impassive, impersonal process sometimes feel that they must resort to more personal approaches and appeals to do justice to their cause.

There is actually something rather frightening about this system of anonymous opinion-writing. Groups do not really have "opinions" in this sense. Groups take action, agree on findings, and agree on conclusions. Groups take a majority vote and issue directives and orders. But groups do not have opinions. Only individual men have opinions and only they themselves can express them accurately. The fiction of a monolithic group "opinion" is one of the heresies on which totalitarian governments are founded, and it is disconcerting to see any remote hint of such a concept in our own form of government.

Why the System Works

What actually goes on behind this slightly sinister façade of anonymous opinion-writing? How did it get started? How does it work? In reality, the present system is efficient and its origins are easy to understand.

The number and complexity of the cases which must be decided by the members of our regulatory agencies is staggering. The technical pitfalls and the procedural restraints imposed by Congress and the appellate courts and utilized to the full in every case by skillful counsel, make every step of the decision-making process a hazardous one. In some cases it can be proved by simple mathematical calculation that the commissioners could not possibly read personally all the documents which are supposed to form the basis of their decisions, much less take the time to write a carefully detailed opinion. It is to solve this very real dilemma that the system of anonymous opinions and opinion-writers has been devised.

The opinion-writers are able, dedicated men. They are often among the finest in their agency. They have a job to do and they do it efficiently and well. They must participate intimately in the decision-making process without letting their own personal views influence the decision. They must stand ready at any time to present legal materials or factual background to the agency members in a neutral and impartial manner. They must make sure that the members of the agency focus on every question which must be answered. They must, from listening to the discussion between the agency members, gain a feeling of the common reasoning of the group. And they must, if possible, make the opinion which they prepare proof against appeal.

Viewed in this context, it is not strange for one man to write both the majority and the dissenting opinion in a case. His job is to present in clear, explicit and orderly fashion the thinking processes which led up to the votes of the various members. Since the opinion-writer is an impartial craftsman who is merely stating the views of others, there is no reason why he cannot write majority and dissenting opinions equally well.

Such a system works. If it did not, it would not have become so widespread and have lasted so long. It has served to relieve the tremendous burden of work on the members of our administrative agencies; it has served to create uniformity of style and tone in agency opinions; and it has probably reduced the number of successful appeals from agency decisions. But these benefits have been purchased at far too high a price. They have been purchased at the price of true democratic government.

Why the System Does Not Work

The fundamental reason why the system of opinion-writing as employed in our federal administrative agencies today cannot work satisfactorily is the simple fact that no one can ever express a man's reasons as well as that man himself. A paraphrase of another man's thoughts must always be a pallid substitute for the original thinking. Opinions of our administrative agencies are like long, scholarly book reviews: They are a fairly good substitute if you can't read the book itself; you get a good idea of the ground covered, but you never really make contact with the mind of the author. One certainly never gets any feeling from anonymous opinions of what Justice Cardozo used to call the "style" of those making the decision.

A summary of one man's thoughts is a poor thing, but administrative opinions attempt to go even further; they try to summarize the thoughts of a whole group of men. What this means

is that opinion-writing is inevitably reduced to a lowest-common-denominator basis. The multiple screening required by the necessity for securing approval of each member of an agency inevitably tempts the opinion-writer to rely on harmless broad generalities and harmless general statistics. A judge who is an equal partner on a multi-member court can hammer out a statement of principles in vigorous argument with his fellows on the bench. An opinion-writer who is a subordinate, serving a whole group of commissioners and often serving as the chief channel for discussion within the group, usually tries only to be so uncontroversial that he will not offend anyone.

We cannot even assume, of course, that an agency opinion will actually reflect—if only dimly and in part—the actual thinking of the members of the agency who decide the case. Anyone familiar with regulatory agencies knows that this is not always true. It has happened that the agency members say to the opinion-writers: "Here's the answer. Go write it up in good legal style." Under the pressure of the enormous volume of printed material pouring into an agency every hour, the oral arguments that go on day after day, the agency meetings, the congressional appearances, the speeches and the service on special committees and boards, members of administrative agencies are inevitably tempted to make decisions as a simple fiat and to leave it to professionals to figure out the reasons why.

Other disadvantages of the professional opinion-writer are just as serious. Because the professional staffs must leave themselves enough flexibility to justify a possible contrary decision in the near future, they shy away from broad general principles, with the result that the industry, their attorneys, and the public generally, have no real idea what to expect in the future. It sometimes seems to me that every case argued before an administrative agency starts from the date of passage of the original regulatory act and argues every issue along the way all over again. This is inevitable under the present system. Only the commission itself can sharpen the issues by stating in opinions of their own composition the basic principles which they intend to carry over from case to case.

The Harris Committee Recommendation

The answer of the Harris Legislative Oversight Subcommittee to all this is simple and clear: Members of administrative agencies must write their own opinions or at least personally direct the writing of their opinions.

This system should work. Opinion-writing by the members of regulatory agencies should not be too hard. After all, agency members often write their own dissents and concurrences. They all write letters. Many of them write speeches. Surely it is not too much to expect them to write in simple, clear prose their reasons for deciding cases as they do.

But the objections are prompt and legion.

The first objection to commissioner opinion-writing is the lack of time. Members of agencies are too busy. But Supreme Court Justices, members of Congress, Cabinet members, the President himself, are also very busy men. Yet all of these men, if they make any mark on the history of their country, leave the stamp of their own personality, their own thought processes, their own personal style on the documents which bear their signatures. As Justice Cardozo once said, "There is a fine conscience in such matters, a conscience that is scornful, even in trifles, of work lower than one's best."[9]

The manner in which the many documents are written by busy men in government is simple and well-known. Each has a personal staff selected and trained by him and responsible only to him. Such a staff develops a close understanding of the thoughts of the individual man for whom they work, what he is interested in, what type of facts he insists on having before him, what he will want to read personally. They work under his detailed direction from the very beginning of the document-writing process. They become extra eyes to read and extra hours to ponder. But in the end, before the document is issued, the man who is to sign it takes over the partly done work of his staff, reviews it, re-works it, and puts on it the stamp of his own thinking. If so many other busy men in the government can do this, surely it can be done by the members of our administrative agencies.

Why does not the typical agency opinion-writing division serve the same function as the personal staff of other government officials? Is it not really the same sort of thing? The answer is that a staff responsible to five, seven, or nine men is not really responsible to anyone. By trying to satisfy everyone it merely succeeds in not seriously offending anyone. It develops a neutral life of its own and a bland style of its own. It creates a blank façade, behind which the individual commissioners become mere shadowy figures on the bench.

It is argued that if members of the agencies wrote their own opinions, the quality and tone of opinions issuing from an agency would be uneven. There is nothing wrong with this, however. The opinions of the Supreme Court are uneven, and so are the state papers of our Presidents. A lively unevenness is preferable to a dead level of uniformity.

It is said that opinions written by members of the administrative agencies might be thought amateurish, with a lack of professional touch. If the opinions of the members of our regulatory agencies are amateurish, let us face the fact. We can all then take pride in watching their capacities grow. And in the meanwhile they will sound like live, flesh-and-blood men giving their own reasons for what they do rather than shadowy figures who let others speak for them.

It is also argued that commissioner-written opinions will be more frequently reversed by the courts. If this is true, it will but bring appellate review into closer conformance with the judicial theory on which it rests. As a matter of fact, this objection to commissioner opinion-writing comes close to an unwitting admission that the present system is illegal. *If the decision of*

(Continued on page 1332)

9. Cardozo, *Mr. Justice Holmes*, 44 HARV. L. REV. 682, 690 (1931).

Court Congestion:

A New Approach

by Julius H. Miner • *Judge of the United States District Court for the Northern District of Illinois*

Judge Miner in this excellent presentation has offered a practical and salutary aid to the overburdened District Judge with the congested civil calendar by a simple, logical and thoroughly proper interpretation of one of the Rules of Civil Procedure. I am gratified that his brethren of this court have unanimously ratified his proposal by the adoption of a new rule embracing his splendid suggestions. If other large courts sitting in jurisdictions where the common law rules of negligence are still controlling, see fit to follow our action, the change could well prove the most effective solution yet devised to the ever-increasing problem of calendar congestion. Unless this and similar improvements such as those referred to so ably by Judge Miner in this paper are soon adopted by the courts and the legal profession, the legislative arm of Government, state and federal, will inevitably solve the problem for us by removing this large segment of legal work from the Judicial to the Executive branch of Government in the form of administrative agencies and tribunals. I highly recommend to the entire legal profession a careful study of Judge Miner's discussion.

WILLIAM J. CAMPBELL, *Chief Judge United States District Court for the Northern District of Illinois*

Court congestion is a critical problem which strikes at the heart of the administration of justice. The Attorney General, all the Supreme Courts and all the bar associations are desperately engaged in an effort to solve it.

Chief Justice Earl Warren of the United States ("Delay and Congestion in the Federal Courts", 42 *J. Am. Jud. Soc.* 6-7 (1958)) summed up the challenge as follows:

> The delay and the shocking congestion in the Federal Courts today have created a crucial problem for constitutional government in the United States ... it is compromising the quantity and quality of justice available to the individual citizen and, in so doing, it leaves vulnerable throughout the world the reputation of the United States ...

Delay causes hardship. Delay brings our courts into disrepute. Delay results in deterioration of evidence through loss of witnesses, forgetful memories and death of parties and makes it less likely that justice will be done when a case is reached for trial. Delay effects settlements favorable to defendants because it slowly wears a claimant down and compels him to accept less money as time goes on. This is a serious evil.

The volume of personal injury litigation in federal and state courts is appalling in the light of the rapid expansion of population, the astronomical increase of automobiles, the constant speeding of transportation by trains, buses and aviation. The judiciary's work load is becoming more and more burdensome due to an endless flow of new legislation, court rules, current legal periodicals and books which must be read to keep abreast with professional evaluation, besides voluminous briefs to read and intricate opinions to write. While we, in the United States District Court for the Northern District of Illinois, may well take pride in our record in disposing of both old and new cases, we also realize the gravity of the situation. We are determined to avoid any further congestion in our trial calendars and to safeguard our judicial system.

The Legal Profession . . . Suffering from Stagnation

We live in an era of rapid change resulting from scientific, technical, social and economic progress. In this era every profession has moved forward with rapid strides—engineers, scientists, architects, physicians, surgeons and accountants. Unfortunately, however, our own legal profession has been suffering from stagnation and lies prostrated behind the parade. While the others are enhancing their prestige —sad but true, we are losing the confidence of the people. As Justice Brandeis

lamented: "The law has everywhere a tendency to lag behind the facts of life."

What we need urgently is a change in our judicial attitude toward the inadequacies of the old procedures. We must recognize the necessity for adopting modern methods for the disposition of litigation more speedily and more effectively without sacrificing any of our cherished substantive or procedural safeguards. Never before have we faced a greater challenge to eliminate outmoded technicalities for the preservation of human rights.

When I dined with Chief Justice Arthur Vanderbilt some years ago, he observed: "Although many litigants find plenty of just causes for complaint, it is in the courts and not in the legislatures that our citizens primarily feel the keen cutting edge of the law. If they have respect for the work of the courts, then the law will survive the shortcomings of every other branch of government, but if they lose their respect for the work of the courts their respect for law and order will vanish with it, to the great detriment of society."

Chief Justice Stone charged (*Dedicatory Exercises of the Law Quadrangle, University of Michigan Law School*, page 47 (1934)):

> Candor would compel even those of us who have the most abiding faith in our profession to admit that in our time the Bar has not maintained its professional position of public influence and leadership . . . More and more the lawyer looks for his reward to the material benefits that too often tend to obscure his larger vision; that sometimes weakens even the confidence of clients in the lawyer's devotion to his interests.

There are two small groups of lawyers principally responsible for our present plight. Both insist upon trial by jury. The specialist lawyers for the plaintiffs, who corral most of the lucrative suits, believe that jury trials beget larger verdicts because juries take a more sympathetic view of liability and damages than do the judges. Statistics show that awards by juries are 20 to 40 per cent higher than in comparable cases tried by judges. (Zeisel, Kalven and Buchholz, *Delay in the Court*, a University of Chicago Law School Study (Little, Brown and Company, 1959), at page 73.) And lawyers in the other small group, in whose hands is concentrated most of the defense work, demand juries for the purpose of delay. As a result, most jury trials are continued constantly to accommodate the pleasure and convenience of these lawyers, raising havoc with the trial judges' calendars.

There is no theory of law which gives a litigant the right to retain a particular lawyer without regard to whether that lawyer has time to try the case. (*Gray* v. *Gray*, 6 Ill. App. 2d 571, 128 N.E. 607 (1955).) The Court in the *Gray* case (at page 578) quoted Justice Jackson's statement in *Knickerbocker Printing Corp.* v. *United States*, 75 S. Ct. 212 (1954):

> When more business becomes concentrated in one firm than it can handle, it has two obvious remedies: to put on more legal help, or let some of the business go to offices which have time to attend to it. I doubt if any court should be a party to encouraging the accumulation of more business in one law office than it can attend to in due time.

It is apparent that the legal profession is making little effort to abate undue continuances for the convenience of counsel. A report of the executive committee of the Cleveland Bar Association (May, 1958) discloses that 65 per cent of all civil cases in the local court of general jurisdiction are handled by fourteen firms. In Philadelphia, approximately 80 per cent of the negligence cases are in the hands of a dozen plaintiff firms and even fewer defendant firms. A similar situation exists in Chicago and New York. (*Ten Cures for Court Congestion*, page 14 (1959).)

A special committee appointed by the American Bar Association to study the problem of court congestion has reviewed the situation thoroughly and prepared a helpful pamphlet dealing with the subject, which constitutes a major contribution to the Bench and Bar. (*Ten Cures for Court Congestion.*) The Committee found (at page 8) that a delay problem exists when the time lapse between filing and judgment exceeds twelve months, and points out that the Executive Committee of the United States Attorney General's Conference on Court Congestion and Delay in Litigation and the Judicial Conference of the United States, have concluded that delay is excessive if it exceeds six months.

The pamphlet discloses that in 1958 the Superior Court of Cook County (Chicago), Illinois, was 57.3 months behind. Similarly, the Circuit Court of Cook County (Chicago), Illinois, was 38.2 months behind; the Supreme Court, Queens County (New York City), New York, was 38 months behind; the Superior Court, Fairfield County (Bridgeport), Connecticut, was 31.5 months behind; and Hartford, Connecticut, and Cleveland, Ohio, both have courts delayed over two years. These figures are based upon the delay between "at issue" and judgment. Obviously, if the time of filing were considered, the delays would appear even greater.

The number of cases filed annually in the United States District Courts has increased more than 60 per cent since 1941. The backlog of cases has risen more than 125 per cent and over 38 per cent of all civil cases in the federal district courts today are subject to undue delay, that is, delay of from one to four years between the date of issue and the time of trial. The average delay in Brooklyn is 42 months; in New York City, Philadelphia and Milwaukee 26 months; in Denver 20 months; in Chicago 18 months, and in San Francisco 13 months. Between July 1, 1957, and March 1, 1958, the backlog in civil lawsuits in the United States District Courts increased by more than 5,000 cases, and it is continuing to rise. (*1958 Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation*, page 21.)

What Can Be Done? . . . Numerous Recommendations

What can be done about trial congestion? Authorities on the subject vary somewhat in their recommendations: increase the number and scope of pretrials; insist upon the availability of counsel; reduce juries to six mem-

bers; transfer cases to lower courts; shift judges; require certificates of readiness; secure impartial medical testimony; authorize interest on damages from the date of accident; give preference to non-jury trials; dispose of cases by administrative commissions, referees, auditors and other quasi-judicial officers; provide for court administrators, court reorganizations and more efficient judicial performance by increasing actual trial hours and conducting summer sessions. It is the virtually unanimous opinion that, because of political and economic considerations, any remedial legislation to supply a sufficiency of additional judges and increased trial facilities is remote. No one of these remedies suggests an adequate solution.

It is reasonably accurate to state that the true bottleneck is the trial jury calendar. Judge Charles E. Clark, as Chairman of the 1956 Attorney General's Conference on Court Congestion and Delay in Litigation, pointed out that the real center of the problem is the jury calendar in the accident cases. Professor Shelden D. Elliott, Director of the Institute of Judicial Administration in New York, points out that in a recent survey of ninety-seven trial courts representing all states, the nation-wide averages show an interval of 11.5 months from "at issue" to trial of jury cases, and 5.7 months for non-jury cases. Jury trials in civil cases have become rare, almost extinct, in England. (*1958 Proceedings of the Attorney General's Conference on Court Congestion*, page 129.) State and federal judges agree that we must concentrate on speeding up the jury trial process and increasing the settlement ratio.

Jury trials are prolonged by *voir dire*, instructions to juries, frequent recesses to discuss problems of law and procedure in their absence, opening statements, closing arguments, charges by the court, jury deliberations and retrials because of disagreements and mistrials. There are more hung juries than defendants. Statistics show that 23 per cent less time is consumed in examining witnesses in a bench trial than in a jury trial (*Delay in the Court*, at pages 9 and 99) and that approximately 40 per cent less time is consumed in the trial of non-jury cases. (*Delay in the Court*, page 78.) Justice Peck reported that he found the jury trial on the average was two and a half times longer than the bench trial. ("Jury Trial on Trial", 28 *N.Y.S.B. Bull.* 322 (1956).) The element of appeal is by far a more frequent and costly factor in jury trials.

It appears vital that there be a basic revision in the general approach to this subject if the prevailing deplorable conditions are to be ameliorated. The alarming problem constitutes a major challenge to our courts, to our moral foundations and to our professional self-respect. We had better act promptly or prepare for even greater disaster. Any attempt to reduce the backlog by appeasement is futile. We must resort to more drastic action or we shall drive people from our courts to other forums. Delay problems led to Workmen's Compensation statutes. If our administration of justice is not improved, the same sort of thing will occur in the personal injury area. Justice Peck, one of New York's leading authorities on court administration, advocated the direct elimination of jury trials in this field (*1958 Proceedings of the Attorney General's Conference on Court Congestion*, page 29). Other prominent jurists are leaning in that direction.

Digressing from the federal court problem, the state courts that are plagued with crushing backlogs, such as Illinois, New York, Connecticut, Ohio and others, may well sponsor legislation providing for voluntary abatement of jury trials in civil cases if and when the third or fourth continuance on the ground of engagement of counsel is procured. No lawyer or litigant has a right to expect a venire of jurors to be maintained perpetually to suit his readiness.

Under the Fourteenth Amendment, the due process clause neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure, and denial of a jury trial in a state court is not a denial of due process of law. (*Olesen* v. *Trust Co. of Chicago*, 245 F. 2d 522 (7th Cir. (1957), certiorari denied, 355 U. S. 896.) A general right of the court to regulate and restrict the right of trial by jury has been sustained.

Julius H. Miner has been on the Bench of the United States District Court for the Northern District of Illinois since April, 1958. Admitted to the Illinois Bar in 1917, he was a master in chancery of the Circuit Court of Cook County (Chicago) from 1924 to 1940 when he was elected to the Circuit Court Bench.

(*Reese* v. *Laymon*, 2 Ill. 2d 614.) 50 Corpus Juris Secundum, page 798, provides: "In the absence of constitutional restrictions, the legislature has power to determine the mode of waiver and what acts or omissions shall deprive a litigant of a trial by jury in a civil action, and the court has no power to make rules contrary to such statutory provisions." Of course, all judges may, individually or uniformly by rule of court, federal, state, county or city, decline to grant a third or fourth continuance on the ground of engagement of counsel for plaintiff or defendant, but they may suggest the withdrawal of the jury demand, if the continuance is granted.

The late Chief Justice Arthur Vanderbilt counselled (*1958 Proceedings of the Attorney General's Conference on Court Congestion*, page 11): "The practical solution of these problems, given a real determination to solve them, is much simpler than most people suspect. It is not the knowledge of ways and means that we lack; it is the will to put them into effect."

I am a devout believer in our jury system and would vigorously oppose the slightest violation thereof. I am fighting to preserve it by repelling any

and every encroachment upon it. Our task ahead is not in reviewing past mistakes and deficiencies but in taking positive and effective remedial action.

Since personal injury cases comprise a great percentage of our litigation, I recommended to my colleagues the adoption of a rule by our court to provide that in personal injury and other civil cases wherein the issue of liability may be adjudicated as a prerequisite to the determination of any and all other issues, both jury and non-jury, the issue of the liability of the defendant or counter-defendant be first adjudicated and the issue of the nature and extent of the injuries and the amount of damages be litigated only after a finding of guilty. This rule may collide with the fixed attitudes of the two small groups of lawyers, for obvious reasons, but it will be a blessing to the vast majority of attorneys for plaintiffs and defendants who want their early day in court. Such a practice will modernize the introduction of evidence, with fewer and simpler issues to be submitted to the jury. It will reduce the trial burden in the numerous cases in which findings of "not guilty" are had in a very large percentage of personal injury cases. (*1958 Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation*, page 57.) It will induce defendants to settle in the event of a guilty verdict. It will eliminate or reduce so-called "nuisance" cases in which liability is doubtful. Successful plaintiffs will get prompt hearings with resulting prompt payment, and innocent defendants will be absolved of liability without incurring added expense. It will induce lawyers to prepare for trial more readily. It will afford greater opportunity to apply effectively our recently adopted impartial expert medical testimony rule. (I recommend reading Chapter 11, *Delay in the Court.*) It will result in the true and proper administration of justice.

The rule provides that the trial judge may, in his discretion, order one jury to decide upon the liability of the defendant and the same or another jury to determine the damages of the plaintiffs. (*Opal* v. *Material Service Corp.*, 133 N.E. 2d 722; *Schultz* v. *Gilbert*, 300 Ill. App. 417, 20 N.E. 2d 884; *Baker* v. *Healy Co.*, 302 Ill. App. 634, 24 N.E. 2d 228.) The judge may recess after a decision of guilty on liability for pretrial or settlement conference or proceed with the trial. The right to a trial by jury does not require that all issues be determined by the same jury and severance of the issues is not violative of any constitutional guarantee. (*Gasoline Products Co.* v. *Champlin Refinery Co.*, 283 U. S. 494, 51 S. Ct. 513; *Smyth Sales* v. *Petroleum Heat & Power Co.* (3d Cir.), 141 F. 2d 41; *Simmons* v. *Fish*, 210 Mass. 563, 97 N.E. 102.)

The basis for the rule is the necessity to prevent undue delay in litigation and to promote the interests of all parties. What can be fairer? This rule is not intended as a panacea, but it will definitely establish a turning point and permit revision of our thinking. It will open the legal channels to new reforms. As Justice Brandeis said, "New devices may be used to adopt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice." (*Ex parte Peterson*, 253 U. S. 300 at 309-310.)

The proposed rule is supported by the sound principle that the decision on liability may dispose of the entire case. (88 C.J.S., Trial, §10.) Determining the order of trial issues is a function reserved to the trial judge (*Gross* v. *United States*, 201 F. 2d 780), and the granting of separate trials of distinct issues is within the sound discretion of the trial judge (*Bowie* v. *Sorrell*, 209 F. 2d 49, 43 A.L.R. 2d 781 (4th Cir., 1953). See also, *Eichinger* v. *Fireman's Fund Ins. Co.*, 20 F.R.D. 204 (D.C. Neb., 1957); *Grissom* v. *Union Pac. R. Co.*, 14 F.R.D. 263 (D.C. Colo., 1953); *Container Co.* v. *Carpenter Container Corp.*, 8 F.R. 389; Rule 42(b), Federal Rules of Civil Procedure, 28 U.S.C.A.; *Bedser* v. *Horton Motor Lines*, 122 F. 2d 406 (4th Cir., 1941); *Hall Laboratories* v. *National Aluminate Corp.*, 95 F. Supp. 323), especially where such separation will tend to avoid prejudice, further convenience, promote justice and assure a fair and speedy trial to the litigants. (88 C.J.S., Trial, §9(a); *Chapman* v. *United States*, 169 F. 2d 641 (10th Cir., 1948), *certiorari denied*, 335 U. S. 860.) This has been noted even in cases holding that issues should not be tried piecemeal. (*Rickenbacker Transp., Inc.* v. *Pa. R. Co.*, 3 F.R.D. 202 (S.D. N.Y. 1942); *Collins* v. *Metro-Goldwyn Pictures Corp.*, 106 F. 2d 83; *Liquid Carbonic Corp.* v. *Goodyear Tire & R. Co.*, 38 F. Supp. 520: *Zenith Radio Corp.* v. *Radio Corp. of Am.*, 106 F. Supp. 561.)

Rule 42(b) of the Federal Rules of Civil Procedure clearly sanctions the rule. It provides:

> *Separate trials.* The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counter-claim, or third-party claim, or of any separate issues or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Rule 83 of the Federal Rules of Civil Procedure provides:

> *Rules by District Courts.* Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

The Federal Rules of Civil Procedure govern jury trials as well as non-jury trials. (*United States* v. *American Optical Co.*, 2 F.R.D. 534 (S.D. N. Y., 1942.) Under Rule 42(b) the court is empowered to isolate and try any issue in a case. (*Carr* v. *Beverly Hills Corp.*, 237 F. 2d 323 (9th Cir., 1956), reversed on other grounds, 354 U. S. 917, rehearing denied 355 U. S. 852.)

Upon these facts and authorities, the Judges of the United States District Court, Northern District of Illinois, Eastern Division, have unanimously adopted the following rule:

> Pursuant to and in furtherance of Rule 42(b), Federal Rules of Civil Procedure, to curtail undue delay in the administration of justice in personal injury and other civil litigation wherein the issue of liability may be adjudicated as a prerequisite to the determination of any or all other issues, in jury and non-jury cases, a

(Continued on page 1333)

Administrative Tribunals and Ministerial Inquiries in England

by Sir Sydney Littlewood • *President of the Law Society*

Sir Sydney addressed the Second Session of the Assembly of the American Bar Association during the 82d Annual Meeting in Miami Beach/Bal Harbour last August. His address dealt with a problem familiar to American lawyers—the difficulty of ensuring fair hearings before administrative tribunals.

Tribunals are a comparatively recent development in England. I cannot tell you when the first was set up, but I can tell you that since 1929 they have increased greatly in number. This is said to be the inevitable result of the continuing extension of governmental activity and responsibility for the well being of the community which has greatly multiplied the occasions on which an individual may be at issue with the administration as to his rights.

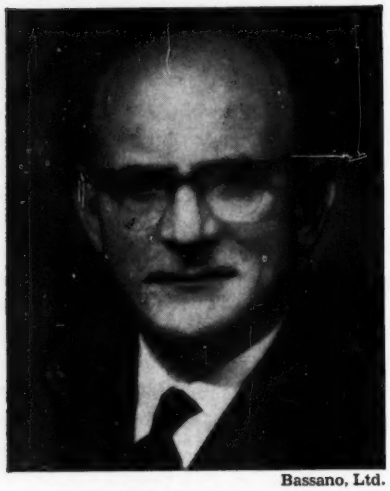
These tribunals, each of which was set up by statute or by statutory instrument, deal with a great variety of subjects. There was no uniformity of procedure, or in the appointment of chairmen. Sometimes a chairman was a lawyer, more often he was not. Sometimes there was an appeal from the decision of a tribunal, sometimes not. Most tribunals had a simple procedure (with some that I encountered I found it difficult to believe that any procedure had ever been laid down), before some tribunals evidence was given on oath, before others it was not, and, I regret to tell you, before some tribunals there was an absolute ban imposed by statute on legal representations.

You will notice that I have dropped from the present tense to the past. That is because a Departmental Committee was set up by the Lord Chancellor in 1955 to enquire into the constitution and working of tribunals other than ordinary courts of law and the working of such administrative procedures as include the holding of an inquiry or hearing by or on behalf of a Minister on an appeal or as a result of objections or representations and in particular the procedure for the compulsory purchase of land. The Chairman of this Committee was Sir Oliver Franks (Sir Oliver is not a lawyer—after a distinguished academic career—he was Visiting Professor to the University of Chicago in 1935—as a war time civil servant, as British Ambassador at Washington 1948-1952, he is now a banker and is the Chairman of Lloyds Bank, one of the largest British banks), and the Committee is known as the Franks Committee. It reported in July, 1957. The Government acted on it very quickly and an act known as the Tribunals and Inquiries Act, 1958, was the major result. As a result of this Act, in the future, tribunals will be better conducted because they will have a proper procedure laid down and in many cases where there was previously no appeal there will be an appeal to the High Court on a point of law. Further, a council known as the Council on Tribunals has been set up with these duties:

> (a) To keep under review the constitution and working of the tribunals specified in the First Schedule to this Act (being the tribunals constituted under or for the purposes of the statutory provisions specified in that Schedule), and, from time to time to report on their constitution and working;
>
> (b) To consider and report on such particular matters as may be referred to the Council under this Act with respect to tribunals other than the ordinary courts of law, whether or not specified in the First Schedule to this Act, or any such tribunal;
>
> (c) To consider and report on such matters as may be referred as aforesaid, or as the Council may determine to be of special importance, with respect to administrative procedures involving, or which may involve, the holding by or on behalf of a Minister of a statutory inquiry, or any such procedure.

With regard to the ban on legal representations you will not be surprised to know that the Franks Committee said "We have no hesitation in recommending that this right (*i.e.*, the right to legal representation) should be curtailed only in the most exceptional cases."

Tribunals deal with an enormous variety of subjects. To give you a complete list would take time and be dull,



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Sir Sydney Littlewood

but let me give a few to show the range: agriculture, education, land, national insurance, prevention of fraud (investments) revenue, road traffic, wireless telegraphy.

Many of these tribunals deal with subjects of great importance to the individuals concerned. The various tribunals covered by "revenue" can be of importance to any taxpayer, the Lands Tribunal of importance to any land owner, the Traffic Commissioners are of importance to every man who runs road transport.

The ban on legal representation has never applied to many tribunals, and where there has been no such ban there has been much scope for lawyers, many of whom have specialized, to the benefit of both clients and themselves.

So far, I have only spoken of tribunals. Let me now turn to administrative inquiries.

Administrative Inquiries . . . an Improved Procedure

When a Minister has to make a decision which will affect a citizen he commonly causes a public inquiry to be held. The purpose of this inquiry is to enable the Minister to inform himself of the facts of the particular case before he makes his decision. When there is such a public inquiry, the Minister concerned appoints an inspector who, after the publication of notice, goes to the locality where the subject matter of the inquiry is situated and there hears evidence (normally not on oath) from any interested party who cares to give evidence. The inspector reports to the Minister, giving details of the evidence given, the facts he finds and, usually, making recommendations.

Before the Report of the Franks Committee, the inspector's report was never disclosed, but, as a result of the Franks Committee's Report, the Minister must now supply a copy of his inspector's report to any interested party.

Several Ministers use the public inquiry, but by far the largest user is the Minister of Housing and Local Government. This Minister deals with many matters which affect the citizen's ownership and use of land, such as town planning, slum clearance and compulsory acquisition.

In England, town planning was first the subject of legislation in 1909. It has grown in importance ever since and today affects every acre of land in Great Britain. No one can make a development in land without planning permission and development is defined as "the carrying out of building, engineering, mining or other operations in, over or under land or the making of any material change in the use of any buildings or other land". (Town and Country Planning Act, 1947, Section 12.) The grant or refusal of planning permission can make an enormous difference to the value of land. For instance, a piece of agricultural land may be worth $250 an acre, but the same land with planning permission to build houses on it may be worth $15,000 an acre. With permission to build a factory the value may be even greater.

Planning permission is given or refused in the first place by local authorities, and they can grant permission either unconditionally or subject to conditions. There is an appeal to the Minister of Housing and Local Government against either a refusal or the conditions imposed on a grant of permission. When there is such an appeal (and last year there were 7,499 of these), the Minister sends an inspector to hold a public inquiry.

As the Minister bases his decision upon his inspector's report and as the Minister's decision can mean so much to an applicant, lawyers are frequently found at planning inquiries in large numbers and at (for England) substantial fees. The Inspectors are servants of the Minister, they are usually surveyors or engineers, and not infrequently possess a town planning qualification. Some of these inquiries on appeals are heavy affairs (I have had them occupy as much as twenty-five hours' hearing time) and often one finds many lawyers engaged—there will be the appellant's lawyer, the lawyer for the planning authority, and any number of lawyers representing objectors. Although no procedure is prescribed at the present time, in fact the procedure we are accustomed to in courts is followed except that the strict rules of evidence are not followed and it is usual for the witness to give his evidence in chief from a written proof, copies of which are provided for the inspector and for all interested parties.

Not infrequently there is amusement to be derived from these inquiries. Some such inquiries, notably those arising from a refusal to permit the excavation of surface minerals, attract hordes of objectors, many of whom get heated. In their heat their "evidence" is liable to be nothing more than vituperation. Inspectors and advocates find that it is usually time saving to let such a witness have his say rather than to try to confine him to fact. As a rule, when he has said all he can say, he looks defiantly at the advocate for the appellant as much as to say "I am now ready to give you even more as you cross examine me." I find that such a type gets disappointed into anger when I say "I have nothing to ask in cross examination."

Town Planning . . . A Difficult Problem

In Britain, town planning has become an important science, and the lawyer who practices in this field should know much of the technical side of it. This involves a knowledge of the way that planning and planners work, and a mere knowledge of planning law is not sufficient for that purpose. If your client wants to build a factory in a given place, you must consider its effect upon the amenities of

the neighborhood, where the labor to be employed in the factory can be recruited, if it is to travel for a distance, the transport facilities available, and many other points. Quite different problems will arise on an application to build a hotel, to lay out a residential estate, or to excavate minerals, and the lawyer who practices in the world of town planning must know how to approach all of these problems. It is true that with the growth in importance of town planning a new profession—the town planners—with its own professional institute, has grown up and there are town planning consultants in private practice who may be consulted, but the lawyer must thoroughly understand the subject if he is to be successful. As the years go by, the technicalities of planning seem to become more and more involved. For those who practice in this field I suppose it could be said to be a good thing; the unfortunate thing about it is that it becomes more and more difficult for the young lawyer who has not grown up with the subjects as I have, to acquire that knowledge of the technical side of planning which is so important.

I know that in some directions and some places zoning is becoming important in America, but I doubt whether it will ever be quite so important here as in Britain, because Britain is a very crowded little island. As a consequence land is in short supply and we have to see that the proper use is made of every bit of it.

Land is frequently wanted by government departments, by local authorities, or by statutory undertakers for the purposes of their functions, and there are dozens of statutes that confer on them powers of compulsory purchase. In normal times those powers are exercised more frequently by local authorities than by government departments or statutory undertakers. Whenever powers of compulsory acquisition are exercised, owners of interests in the land affected have a right to be heard at a public inquiry. Because most compulsory purchase orders are made by local authorities, and local authorities are subject to the control of the Minister of Housing and Local Government, most of these public inquiries are held by that Ministry. They follow the same pattern as inquiries on town planning appeals.

From 1948 until now, when land was acquired under compulsory powers, the owner received, as compensation, less, sometimes much less, than the true value. For instance, if there were two similar plots, side by side, upon each of which a house could be and would be permitted to be built and one plot was acquired compulsorily, the amount of compensation might have been $30. The other plot, sold in the open market, might realize $1,500. That unjust state of affairs has been altered by a statute (The Town and Country Planning Act, 1959) which received the Royal Assent on July 16, 1959.

That statute provides that market value shall be paid on compulsory acquisition. Because of the unfair basis of compensation that has existed for many years, nearly every compulsory purchase order made in respect of vacant land was resisted. That made a good deal of work for lawyers. The new act will probably reduce greatly the number of cases in which there is opposition to a compulsory purchase order. It may also make some local authorities less ready to seek to purchase compulsorily now that they know they will have to pay full price for what they acquire.

While I am dealing with the question of compensation, you will probably be interested to know that in certain circumstances compensation is paid for a planning refusal. The basis upon which the amount is arrived at is far too involved for me to explain in the time I have at my disposal, but the amount is rarely, if ever, anything like the proper value of the land with the planning permission sought. The Town and Country Planning Act, 1959, has not affected that basis.

Because we have in Britain many hundreds of thousands of substandard houses which the government is determined to demolish and replace as quickly as circumstances permit, orders, known as slum clearance orders, are common. These are often resisted and that involves another ministerial inquiry.

Whenever the amount payable is disputed and the dispute not settled between the parties, the matter goes to a tribunal known as the Lands Tribunal. This tribunal consists of lawyers and surveyors appointed by the Lord Chancellor. It enjoys a high reputation in all quarters. It has many functions in addition to settling disputed compensation values. For instance, appeals against decisions by local valuation tribunals on rateable values go to the Lands Tribunal (and on questions of fact there is no further appeal) and the Lands Tribunal can remove covenants affecting land where the character of the surrounding land has changed so much that the covenants are no longer appropriate. The Lands Tribunal provides much work of a specialized nature for both lawyers and surveyors.

Points of law arise fairly frequently before the Lands Tribunal. There is and always has been an appeal from the Lands Tribunal to the High Court on a point of law, but there is no appeal on fact.

In the past it has not always been easy to get from a tribunal (I am not here speaking of the Lands Tribunal) to a court of law even on a point of law, but that matter was remedied to a large extent by Section 9 of the Tribunals and Inquiries Act, 1958, which provides that in the case of many tribunals any party to proceedings before such tribunal who is dissatisfied in point of law with a decision of the tribunal may either appeal to the High Court or require the tribunal to state and sign a case for the opinion of the High Court.

Our High Court generally has power to put inferior tribunals right if they err by exercising a jurisdiction which is not theirs. It exercises this jurisdiction by writs of certiorari and mandamus. In some Acts which set up tribunals, it was laid down that no order or determination of that tribunal should be called into question in any court, so that no matter how grossly the tribunal erred or exceeded its jurisdiction the courts could not interfere. I regret to say that two acts, passed as recently as 1948, contained such a

provision, but I am pleased to add that my country has seen the error of its ways and Section 11 of The Tribunals and Inquiries Act, 1958, says:—

> As respects England and Wales or Northern Ireland, any provision in an Act passed before the commencement of this Act that any order or determination shall not be called into question in any court, or any provision in such an Act which by similar words excludes any of the powers of the High Court, shall not have effect so as to prevent the removal of the proceedings into the High Court by order of certiorari or to prejudice the powers of the High Court to make orders of mandamus.

In my country, administrative tribunals and ministerial inquiries have come to stay. I have said enough to show you that in their growth many have shown a tendency to develop characteristics which must offend all lovers of liberty and justice, but recent moves, statutory and otherwise, that all was not well, have resulted in great improvements.

Those lawyers who practice regularly in this field know that they have a heavy responsibility to protect the citizen against officialdom. Their organizations have played a prominent part in bringing about the improvements of which I have spoken and will continue to press for further improvements.

Opinion of Professional Ethics Committee

OPINION 296
(August 1, 1959)

LEGISLATIVE COMMITTEE—LAW FIRM PRACTICING BEFORE—MEMBER OF LAW FIRM A LEGISLATOR—A law firm may not accept employment to appear before legislative committees while a member of the firm is serving in the Legislature.

LEGISLATIVE COMMITTEE—LAW FIRM PRACTICING BEFORE—FULL DISCLOSURE BY FIRM TO COMMITTEE—A law firm may not accept such employment although a full disclosure is made to the committee as to the representation by the law firm and the fact that one of the partners is a member of the legislature.

LEGISLATIVE COMMITTEE—LAW FIRM PRACTICING BEFORE—LEGISLATOR MEMBER OF FIRM NOT PARTICIPATING IN FEES—A law firm may not accept such employment when the member of the firm who is serving in the legislature does not share in any fees received thereby.

Canons 26 and 32.

Opinions 16, 49, 72

The Opinion of the Committee was stated by Mr. JOHNSON, Messrs. ARMSTRONG, JONES, MCCOWN, MILLER, JR., PETTENGILL, SHEPHERD, JR., and COULTER concurring.

The text of the Opinion is as follows:

Canon 26 of the Canons of Professional Ethics reads:

> A lawyer openly, and in his true character may render professional services before legislative or other bodies, regarding proposed legislation and in advocacy of claims before departments of government, upon the same principles of ethics which justify his appearance before the Courts; but it is unprofessional for a lawyer so engaged to conceal his attorneyship, or to employ secret personal solicitations, or to use means other than those addressed to the reason and understanding, to influence action.

and Canon 32:

> No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation . . . But above all a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen.

In Opinions 72 and 49 this Committee held:

> The relations of partners in a law firm are such that neither the firm nor any member or associate thereof, may accept any professional employment which any member of the firm cannot properly accept.

In Opinion 16 this Committee held that a member of a law firm could not represent a defendant in a criminal case which was being prosecuted by another member of the firm who was public prosecuting attorney. The Opinion stated that it was clearly unethical for one member of the firm to oppose the interest of the state while another member represented those interests. The positions are inherently antagonistic and no question of consent could be involved as the public is concerned and it cannot consent. Since the prosecutor himself could not represent both the public and the defendant, no member of his law firm could either.

It is the opinion of the Committee that a law firm could not accept employment to appear before a legislative committee while a member of the firm is serving in the Legislature. A full disclosure before the committee would not alter this ruling nor would it be changed by the fact that the member of the Legislature would not share in the fee received thereby.

An Old Problem:

The Federal Diversity Jurisdiction

by George Cochran Doub • *Assistant Attorney General of the United States*

The propriety of the grant of diversity of citizenship jurisdiction to the federal courts has been a controversy since the earliest days of the Republic, Mr. Doub points out. In this article, taken from an address delivered at the Judicial Conference of the Fourth Circuit held in Asheville, North Carolina, last summer, he discusses the status of the diversity jurisdiction in the light of modern conditions.

The principal proposals today to modify federal court jurisdiction relate to the controversial diversity problem. You will recall that the sole basis for the original grant of diversity jurisdiction to the national courts was the assumption that state courts could not be expected to be unbiased in controversies between citizens of different states. It was assumed that they would favor the resident by reason of their prejudice against the non-resident. Hamilton and the other proponents of this jurisdiction were able to suggest no other reason than this for diversity jurisdiction, namely, state attachments, state prejudices and state interests.

In 1789 this fear may have been a real one for we had only citizens of separate and independent states with compelling loyalties and attachments to them.

The inadequate condition of the state judiciaries contributed to this fear. Chancellor Kent pointed out that of the judges of the First Superior Court of Massachusetts, "none were lawyers". Of the State of New York he said: "The progress of jurisprudence was nothing in this state prior to 1793, there were no decisions of any of the courts published, there were none that contained any investigation." In each state except Maryland and Pennsylvania, judges were chosen by the legislature for short terms. In Georgia, Pennsylvania and Connecticut, the legislature chose the judges upon an annual basis. The judicial process was largely under the control of state legislatures. State assemblies by special statutes reviewed civil judgments, vacated judgments, granted new trials, annulled deeds and reversed convictions. In a number of states there appears to have been no clear separation of powers.

Even under these provincial conditions, the proposed diversity jurisdiction was bitterly denounced in the debates on ratification of the Constitution by the states, and upon consideration by the Congress of the proposed Judiciary Act.

Charles Warren and others have pointed out that there was no part of the federal jurisdiction which sustained so strong an attack from the Anti-Federalists and which received so weak a defense from the Federalists.

Madison envisaged that this was a temporary provision which would allow federal courts to handle these controversies until "they find the tribunals of the states established on a good footing". Significantly, a staunch Federalist questioned the scope of federal jurisdiction under the then recently adopted Judiciary Act at a time when the federal courts were handling comparatively few cases. President Washington stated in his second annual address to Congress: "The laws you have already passed for the establishment of a Judiciary System have opened the doors of Justice to all descriptions of persons. You will consider in your wisdom, whether improvements in that system may yet be made . . ."

Attacks upon diversity have been steadily mounting in intensity during recent years and have continued in spite of the statute of July, 1958, (1) increasing the jurisdictional amount to $10,000, (2) providing that a corporation shall be deemed a citizen of a state where it has its principal place of business as well as the state of incorporation, and (3) forbidding the removal of state workmen's compensation cases from the state to the federal courts. Nor has the criticism been stilled by a material decrease in private civil cases filed in the District Courts during the past year.

The liveliness of this controversy may even be reflected in a recent decision of the Supreme Court. Only this summer the Supreme Court in the *Louisiana Power and Light Company*

case—a diversity case—held that the District Court had properly abstained from deciding a new question of state statutory law until the issue was determined in the state courts. In his spirited dissent Mr. Justice Brennan suggested that an unstated reason for the Court's decision was its "distaste for the diversity jurisdiction".

Diversity Jurisdiction . . . Some Current Proposals

Now what are the current proposals affecting the diversity jurisdiction?

Justice Jackson, Justice Frankfurter, Justice Harlan, Charles Warren, the noted historian of the federal courts, Professor Kirland and Professor Herbert Wechsler, both outstanding authorities on the federal system, all now favor the abolition of diversity jurisdiction. One Circuit Judicial Conference—the Ninth Circuit—voted some years ago to end it.

In October, 1945, Judge Denman testified before the Senate Judiciary Committee on behalf of twenty-four Circuit and District Court Judges of the Ninth Circuit in support of a Senate bill to abolish diversity jurisdiction except for removal by a non-resident defendant in a state court action upon a showing that "from prejudice or local influence he will not be able to obtain justice in such State court". The Committee does not appear to have acted upon this bill. (S. 466, 79th Cong., 1st Sess.)

The arguments for the elimination of diversity are these:

This jurisdiction is employed, not to vindicate rights grounded in federal authority, but solely to administer state law. Withdrawal of these cases from the state judicial processes involves a violation of the principle so strongly urged originally to justify federal judicial power, namely, that judicial authority should be co-extensive with the legislative power. The state judicial authority is less extensive than its own legislative authority when inherently state cases are taken over by federal courts whose judgments are not subject to state review. The assumption that a non-resident will be treated unfairly in state courts is now a reflection on our well-organized state judicial systems. Our national feelings, mobility of modern life, interstate communications, have all diluted our state attachments.

If prejudice against a non-resident results in any unfairness, the protection lies—as in the case of other prejudices—in appellate proceedings. Professor Wechsler has pointed out that it is curious that the least troublesome of prejudices, that against a non-resident, should be the basis of a special federal jurisdiction which is not provided for the more troublesome prejudices flowing from faction, interest, race or creed.

Since *Erie Railroad* v. *Tompkins* in 1938, federal courts must apply state law in these cases and no federal law, statutory or decisional, is involved. As the Supreme Court has put it, the federal court is deciding state-created rights and is, in effect, "only another court of the state". The federal courts may not establish the local law of the fifty states. They may merely speculate as to what it may be and their decisions are not controlling upon any state courts. Whenever state law is undetermined or obscure, a federal court may conjecture what it will become but its decision may not settle the question.

Whenever actual prejudice to a non-resident may be shown, all critics favor opening the door to the national courts but they point out that the reasons many of these inherently state controversies are in the district courts now bear little relation to the historic basis for the jurisdiction, namely, assumed prejudice against a non-resident. Often a diversity case is there by reason of the belief of counsel that in the particular case the federal court offers an advantage to his client, or a disadvantage to the other party. Plaintiff's counsel, in electing the District Court, may believe federal verdicts are higher, remittiturs less frequent and reversals of jury verdicts less likely. Defendant's counsel, in electing the District Court, may believe federal pretrial procedures and discovery proceedings are more effective, a directed verdict is more likely or critical rules of evidence will be applied.

Justice Frankfurter wrote in 1954:

> The stuff of diversity jurisdiction is state litigation . . .
>
> A legal device like that of federal diversity jurisdiction which is inherently, as I believe it to be, not founded in reason, offers constant temptation to new abuses . . . Is it sound public policy to withdraw from the incentives and energies for reforming state tribunals, where such reform is needed, the interests of influential groups who through diversity litigation are now enabled to avoid state courts?

Justice Jackson concluded:

> In my judgment the greatest contribution that Congress could make to the orderly administration of justice in the United States would be to abolish the jurisdiction of the federal courts which is based solely on the ground that the litigants are citizens of different states.

The arguments against the termination of diversity are so well known that they would seem to require but brief summarization.

The Argument for Keeping Diversity Jurisdiction

Prejudice against out-of-state litigants is not so rare, especially in rural areas, as might be supposed, but, on the contrary, is definite and substantial. The efficient and progressive administration of justice in the federal courts in diversity cases serves as an example and a prod to the state judicial systems. A sound public policy requires that the national courts continue to be courts of general jurisdiction and, if diversity is lost, they will tend to become courts of less significance.

A less drastic proposal would not eliminate diversity but would curtail the number of diversity cases by changing the treatment of corporate citizenship. As you know, by judicial decision a corporation for diversity purposes is deemed a citizen of the state in which it is incorporated. Diversity exists whenever a corporation's articles of incorporation happen to be filed in a state other than that of its adversary and, under the 1958 Act, the corporation does not have its principal place of business in the state of its adversary. This basis of corporate diversity seems inherently artificial. For example, the District Courts throughout the country are open to the Atlantic Coast Line Railroad Company and the Seaboard Air Line Railroad because of their

imputed Virginia citizenship, where they are incorporated. There may be a prejudice against these railroads in other states but surely it is not because their articles of incorporation are filed in Richmond.

Since 1878, when the Supreme Court reversed its prior decisions and began the development of the doctrine of corporate "presence" so that a corporation may be sued in any state in which it has an agent doing business, repeated congressional attempts have been made to limit federal diversity jurisdiction as to corporations doing business in other states. Bills to this end were passed by the House of Representatives in 1880, 1883, 1884, 1887 and 1892 but failed each time in the Senate. The principle of these bills was that no diversity jurisdiction should be permitted as to corporations.

In 1928, President Herbert Hoover and his then Attorney General William D. Mitchell recommended to Congress a bill providing in substance that for purposes of diversity a corporation should be deemed a citizen of any state in which it conducted business. In 1932, hearings were held before a Subcommittee of the Senate Committee on the Judiciary, and before the Committee on the Judiciary of the House upon the Attorney General's bill and a bill of Norris and LaGuardia to end diversity. The Norris-LaGuardia Bill or, in the alternative, the Attorney General's Bill, was supported by Mr. Charles Warren, Felix Frankfurter, then a professor at Harvard, and the then Dean of the Yale Law School, Charles E. Clark, now Chief Judge of the Court of Appeals for the Second Circuit.

It is of interest that corporate spokesmen, in opposing these bills before the congressional committees, minimized the number of cases that corporations instituted in the federal courts, or removed to them, and they conceded that local state prejudice occurred rarely and sporadically. A spokesman for the insurance companies said, "We remove very few cases to the federal courts. Most of our cases are tried in the state courts."

The Senate Judiciary Committee favorably reported the Norris-LaGuardia Bill but it did not come to a vote in the Senate. The House Committee made no report on this bill and failed to approve the Attorney General's bill by a vote of ten to six.

Congressman Howard Smith has introduced a bill in the present Congress providing that, for diversity purposes, a corporation shall be deemed a citizen of any state in which it is licensed to do business. There is considerable support at the present time for this proposal on the ground that, whatever prejudices may exist in a state against a corporation, it is not based upon the fact of its technical incorporation elsewhere. All those who support the ending of diversity naturally support this proposal. Chief Judge Clark of the Second Circuit and Judge Learned Hand favor this curtailment. As Judge Hand wrote last year, "The bias that exists against corporations does not much depend . . . upon where they are organized."

On the other hand, in 1956, the Judicial Conference of the United States, which supported the 1958 legislation, rejected the suggestion that a corporation be deemed a citizen of any state in which it does business on the ground that this "would be to deny to business corporations doing business over a wide territory, the sort of protection which they need against local prejudice and the benefit of the salutary rules and practice of the Federal courts".

Another proposal to curtail diversity jurisdiction would deny access to the federal courts to a plaintiff who is a citizen of the state in which the action is brought. This proposal, first suggested by Judge Bailey Aldrich of the District Court of Massachusetts, has had the support, among others, of a committee of the judicial conference of the Second Circuit composed of Judge J. Edward Lumbard, Judge Lawrence E. Walsh, Judge J. Joseph Smith, and Judge Walter Bruchhausen. Congressman Howard Smith has introduced a bill in the Congress designed to implement this recommendation.

No Equality of Access to the Federal Courts

It seems evident that there is no justifiable reason for permitting a plaintiff to resort to a federal court in his own state in a suit against a non-resident.

Harris Ewing

George Cochran Doub is Assistant Attorney General of the United States in charge of the Civil Division and was formerly United States Attorney for the District of Maryland. A graduate of Johns Hopkins University (B.A. 1923) and of the University of Maryland Law School (LL.B. 1927), he practiced law in Baltimore. During World War II he served as an officer of the United States Navy with a carrier air group in the Pacific.

Certainly the assumption may not be made that local state courts will be prejudiced against the local plaintiff, so federal jurisdiction in such cases is totally at variance with the philosophy of the diversity jurisdiction.

The only reason which anyone has been able to advance cautiously against this proposal has been that, since a non-resident defendant may remove the case from the state court to a federal court, the local plaintiff should be entitled to the correlative right to initiate the action in the District Court. However, Congress has already rejected the suggestion that there should be mutuality or equality of access to the federal courts in diversity cases. The Removal Act (28 U.S.C. 1441) permits an out-of-state litigant sued by a local plaintiff in the plaintiff's state court to remove to a federal court, but if the situation is reversed and a local defendant is sued in his own state court by an out-of-state plaintiff, the local defendant cannot remove. The Congress rightly recognized that the grant of federal jurisdiction in diversity cases was for

the benefit and protection only of the non-resident. So the only argument suggested in opposition to this proposal appears to be without substance and I am in complete accord with Judge Aldrich that there is no valid reason to permit a local plaintiff access to the federal court of his own state in a civil controversy involving state law.

The practice of deliberately manufacturing diversity jurisdiction in suits under death statutes has developed by the appointment of an ancillary administrator in a foreign state for no other purpose than to institute the action against a local defendant in the federal court. Chief Judge John Biggs of the Third Circuit estimates that there have been about one hundred instances of this kind in the Commonwealth of Pennsylvania alone. The federal courts have generally sustained jurisdiction of these cases on the ground that the device used is beyond the reach of the federal statute, 28 U.S.C. 1359, forbidding collusive suits. The deliberate manufacture of federal jurisdiction by such a palpable fiction seems a perversion of the diversity concept. A full review of this problem appeared in 1 *Villanova L. Rev.* 201 (May, 1956).

In conclusion may I suggest that our concept of federalism involving parallel and independent judicial systems requires a delicate balance for its continued success. As a reflex of the general growth of federal power, there has been a steady expansion of the jurisdiction of the federal courts. So, too, this process has been accompanied by a concomitant decline in the significance of the work of the state judicial systems. However inevitable these tendencies may be, it is apparent that one aspect of the work of the federal courts is not essential in any way to the vindication of federal rights or the proper functioning of national interests or of the national government—diversity cases. Jefferson said, "One rarely has discomfort from eating too little." I think that the federal system may have been attempting to digest too much.

Although it is difficult to sustain this jurisdiction in terms of the logic of its historical derivation, it has been such an inherent part of the federal system for so long, and its roots are so deeply imbedded, that I believe, before Congress should end it, an extensive documented study should be made in terms of its present actual pragmatic values. Such a study may indicate that, regardless of the original reason for its creation, diversity may serve a valuable function in contemporary legal life.

In May of this year, Chief Justice Warren expressed the hope in his address to the American Law Institute that the Institute would undertake a full study of this controversial matter and the Council of the Institute is now considering whether this may be done. I believe that such a comprehensive study might well include the reasons why litigants today elect federal court jurisdiction and whether there is a relationship between the volume of diversity cases in particular districts and the adoption of efficient modern civil procedures by the state courts of those districts.

In any event, the complexities of a dual federal-state system of government require constant review and adjustments in its functioning mechanisms. And this demands the very best energies of the Bench and Bar. Of one thing we may be certain. The principle of local self-government on the municipal level, the county level and the state level is a vital and indispensable part of our system and federal power, whether legislative, executive or judicial, should be periodically evaluated in terms of its effect upon that principle. Our confidence and pride in the federal judicial system should not preclude such inquiry.

Freedom—no word was ever spoken that has held out greater hope, demanded greater sacrifice, needed more to be nurtured, blessed more the giver, damned more its destroyer, or come closer to being God's will on earth.

May America ever be its protector!

—Address by General of the Army Omar N. Bradley to Freedoms Foundation, February 22, 1951.

Freedom Under the Law:

The Challenge to the English-Speaking Bar

by Geoffrey Lawrence, Q.C. • *Vice Chairman of the General Council of the Bar of England and Wales*

This issue of the JOURNAL carries addresses by two of our illustrious guests from the United Kingdom at the recent Annual Meeting. Mr. Lawrence spoke at the Third Session of the Assembly, which was held in the International Room of The Americana on Thursday afternoon, August 27.

Thirty-two years ago next month I first set foot on the soil of the United States. Some of the gentlemen amongst you today are old enough perhaps to remember that time. That was the time when it was supposed that the heady intoxication of youth and the more sluggish reactions of the middle aged could be sufficiently derived from listening to the latest George Gershwin hit on Broadway, supplemented by the consumption of the pure and unadulterated contents of a bottle of ginger ale.

For the rest, we had to make those personal and private adjustments to the Eighteenth Amendment of your great Constitution, the ability to make which has always been the mark of a free people.

I am proud that in my apprenticeship to your great nation I shared the days of your tribulation and adversity.

As I walked the streets of New York City in the delicious cool of a September afternoon, looking into what was then the illimitable vista of the future and also looking for an address in a midtown part of the city, the directions to which I dared not to ask in case my informant should be an F.B.I. man on the lookout for information, in the course of the perambulation of those streets it little occurred to me and little did I dream that one day I should be standing and exercising the privilege and enjoying the distinction of addressing the Assembly of the American Bar Association.

Time and destiny work miracles. Miracles continue, time runs on, and for the moment I am here I am enjoying my privilege, and I trust you will not be too much exhausted at the end of it.

One of the remarkable things to me about your meeting here—and I suppose it is the same every year—is that it is a conclusive demonstration to the Almighty, if further proof were needed, which it is not, that twenty-four hours is an inadequate complement for one day's time. The result of it is, unfortunately, that the one commodity without which in the end we cannot do is sacrificed in greater and greater measure. Sleep disappears, I am sure, and would disappear completely if your meeting lasted but a few days longer.

But I am here with my wife at the generous and kind invitation of your illustrious President and we have spent the last five days or more in your company. I am more than honored and delighted at last to have an opportunity of saying how much we have been overwhelmed with the kindness that you have shown us, how much we have been touched by the forbearance which you have extended to those idiosyncracies of the stranger from beyond your shores, how often we have been invited to reunions not only in Washington next year but also elsewhere. It would ill become me if I did not take this opportunity of saying, on behalf of both of us, how grateful we are, and of assuring you that we have both, as I hope and believe made friendships here in Miami which will endure. We have certainly collected memories which we shall carry back with us to our homeland, memories which will keep alive recollection of your great Association.

I, you know, am here as a substitute. The invitation went originally to the Chairman of the Council of the Bar in England. He unfortunately had made plans which could not be altered, and the task fell upon the Vice Chairman. I do not know how it is with you ladies and gentlemen, but in my country there is a certain amount, shall I say, of ambiguity about that word "vice". It is tinged with a certain obscurity. My experience is that it leads the holder of that title to find himself burdened with all the dirty work, all the tiresome and the difficult problems for which it is quite plain at all times that the Chairman is far too busy to have time.

In this instance his loss has been my gain, and I cannot imagine anything

more delightful than to be asked to take the place of the Chairman and to be asked to represent him and the Bar of England as a whole at your deliberations here in Miami.

In the last half an hour I have had to make one of the most important decisions that has confronted me in the course of my professional life. For some days past I have had a growing suspicion, mounting this afternoon into a certainty, that Walter Owen was going to deliver the speech which I had prepared. Of course he and I talked to one another about a great many things, but we had not so far spoken about the subject matter of the speeches that we were going to make. The titles of both, you will observe, give very little away about their contents.

The decision that I have had to make is this, should I disregard and forget everything that I thought of saying to you and embark on a discussion, shall we say, of systems of land tenure in England in the Middle Ages, or the origins of modern copyright law, or defects in this, that, or the other branch of our law, or should I stick to what I had thought of saying even though thereby I run the risk of repetition? In the end, chiefly because I am not adequately equipped to deal with the topics which presented themselves to me as possible alternatives, I have decided to give you the substance of my speech about which I have been collecting my thoughts in those rare intervals when it has been possible to collect any thoughts here in Miami in the last five days.

The title of my address contains the epithet "English Speaking". After I had chosen that, I was conscious that it was perhaps not only overworked but it was perhaps ill-chosen; it might well be provocative to those on either side of the Atlantic who consider that they have a monopoly in the exercise of that accomplishment.

I was reminded of that matter by what was said to me by one of your distinguished jurists a little while ago. He is not here present at this meeting, and wild horses would not drag from me his identity. But he had been traveling in Europe visiting all those polyglot countries one after the other where you can leave one country with a Romance language at nine o'clock in the morning and you will find yourself endeavoring to order dinner in the more gutteral accents of Teutonic derivatives.

He himself had not the gift of tongues, and ultimately at the end of his trip he came to England, and he said to me, "You know, I was so relieved when I got to London. I found the people there spoke English."

A Community of Language . . . a Community of Thought

I do not think that he meant that he was glad only to catch some recognizable articulate sounds. I think he meant more than that. I think he meant that he was glad to be in a city and a country where there was, at any rate, some community of thought as well as language as a common approach to the difficulties of life.

No speech on an occasion of this sort, as I have discovered not only from listening to my fellow-performer from Canada this afternoon but from your own distinguished speakers, would be complete unless it was garnished by a suitable quotation from some distinguished author. In my researches to find the apt quotation I found that nearly two hundred years ago the English orator, Burke, in talking of your people, said this: "In no country perhaps in the world is the law so general a study. This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources. They augur misgovernment at a distance and snuff the approach of tyranny on every tainted breeze."

What was true nearly two hundred years ago, in the year 1772, is, as I am convinced from what I have heard and seen in the last five days, true of 1959. But those qualities which the study of the law confers upon those who serve that mistress, that acuteness, that inquisitive power of analysis, that dexterity, that readiness in attack and in defense, those are qualities which carry with them an equal responsibility in their exercise. We have the fortune, or the misfortune, whichever way you look at it, to live in a century when civilization as we have known it and inherited it over two thousand years or more is threatened by the greatest tyranny that man has ever known. Our thoughts and our actions are dominated by the fear that the lights that we know, by which we have lived, will go out, extinguished in the total eclipse of freedom.

In combating that menace, military defense is not enough. We must have it, we must pay for it, but the real attack is not upon the bodies of men and women and children; it is not upon the bricks and mortar of their house nor upon their possessions; the real attack is upon their minds and upon their souls, and the danger that we face, is the danger that in coming to terms with a modern commercial and industrial society, we shall unconsciously admit the enemy into the very citadel of freedom and one day we shall find that unknowingly the pass has been sold.

You see now, ladies and gentlemen, what I must have been going through when I listened to Walter Owen talk about these things.

You may perhaps understand why notwithstanding that I have determined to stick to my theme.

In my view the pursuit of security carries within it the seeds of that danger to which I have referred. Protection is necessary but protection carried to the extreme of the extinction of what you desire to protect is in effect a surrender to the enemy.

You will remember (I do not quote now; I only paraphrase) these famous words that were said in the heat of controversy, "I disagree with every word he has said but I would defend to the death his right to say it."

We cannot, of course, allow everything to be said at all moments, either in my country or in yours. But we should surely look upon the measures which are necessary for the security of the nation, as exceptions grafted upon the rule of complete freedom of speech, there for a limited time until the danger has passed, and to be removed at the earliest moment. We should be careful and watchful to see that they do not become ingrained and permanent.

From the lawyer's point of view, the logic of the law is an inadequate protection. I also have gone to the fountain head of these matters, your great

lawyer, Mr. Justice Holmes. At the beginning of his lectures on the Common Law, he said this: "The life of the law has not been logic; it has been experience, the felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious. Even the prejudices which judges share with their fellowmen have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

Is that not true today? The question is, how do we reconcile individual freedom with the necessities of corporate organization? What limits ought we impose upon state interference with the liberty of the individual?

Many people have offered a solution to that question. Some have seen it as a compromise between the two extremes, the extreme of anarchy where it is every man for himself and where the weak are eliminated, and the extreme of the total regimentation of every man, woman and child to the political doctrines of the state. Some have seen it by way of a compromise between those two extremes.

The Cure for Anarchy . . . Freedom, Not Servitude

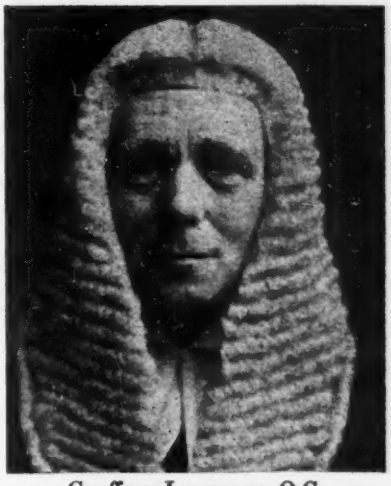
In my view—and I hope this is a matter which will particularly appeal to lawyers—there can be no compromise at all upon issues of freedom. A compromise will result in a shifting and uneasy balance which exhibits both the evils in turn from which it seeks to escape. The solution, as I see it, lies in that paradox that it is freedom and not servitude which is the cure of anarchy. And when Mr. Justice Holmes spoke in the quotation which I just read of the intuitions, the unconscious intuitions of public policy, he was speaking of that genius which the English-speaking peoples, your country and mine, Walter Owen's country, the other Commonwealth countries, have shared for understanding intuitively what is meant by freedom and how even those measures which have to curtail the freedom of the subject for the benefit of the community can be voluntarily accepted because the acceptance is the free exercise of the will of every individual who is affected by them. This is the working of a democratic, and a truly democratic, political system. Those intuitions, as Mr. Justice Holmes observed, are often unavowed and unconscious.

It is the duty of our profession, is it not, understanding them so well, to make those instinctive preferences and inarticulate convictions explicit and articulate. We have to regard ourselves, with all the advantages that we possess, from training and inheritance, as the mouthpiece, the voice of those people who cannot express it themselves but whose desire it is that those principles should be expressed.

I do not know whether I may say this to you here. I take the view that it is not enough to leave the enunciation of those principles to the judges. Some of the less robust of them—I am talking of mine, not yours, of course—beguile the tedium of their extensive leisure by regarding themselves as the mere interpreters of the law. Others, the stronger-minded type, know that that is an illusion. They know that they make the law. They know, as well as you and I know, that opposite results, both equally plausible, can arise from the judicial interpretation of precisely the same set of words. You and I know that one or other of those results will prevail, and the result that will prevail will be the result which is in tune with current public opinion. It is the judges who therefore make the law and who give expression to it.

But whether they admit it or not, whether they like it or not, those judges are dependent upon the Bar for the formulation of the conflicting views upon which they have to decide. It is you, it is we, who in the first place formulate the submission upon which the judge has to decide, or, to put it perhaps a little more colloquially, we offer the choice of views and he can choose which he likes.

Our procedural system, and yours, too, which involves the battle of wits, that clash of personality, that thrust and parry which is the never-failing joy of the advocate in a court of law, is a system peculiar to your country and mine and to those which have derived the system from us. Do not hesitate,



Geoffrey Lawrence, Q.C.

may I say to you, if you find yourselves acting for the side of oppression. Do not hesitate to be the Devil's advocate. That is the way our system works; and no half-hearted exposition of one argument can possible serve it. We must be faithful to our principles, whatever our cause and whoever our client, because I profoundly believe that it is from the violence, if you like, of that clash of personality, that clash of ability, that conflict of intelligence, it is from that that the truth and the real principles that we desire to see enshrined in judicial judgment, may best be seen to arise. Why are we particularly able to assist our judges in that way? Because we derive our strength and our knowledge from tradition and from the past. We must know what the law has been before we can found our submission upon what the law ought to be.

It has been said that in order to know what is going on in the courts of the Commonwealth of Massachusetts, it is necessary to have some knowledge of the customs and practices of the ancient German tribes. I do not know whether that is true or not, because I am wholly unfamiliar with the procedure of the courts in that New England state. But it is an extreme illustration perhaps of the point I am seeking to make.

The great fallacy of all revolutionaries is that they can wipe the slate clean and write something that has never been written before. History has shown abundant examples of that, but

no century other than ours has displayed such a brutal and calculated example of it.

Enslavement of the mind, the permeation of all thought and activity not only in the courts, as Walter Owen has said, but in those other things from which the spirit of man derives its sustenance, literature and the arts, in those, too, there must be this wicked controlling political doctrine. That is an attempt by revolutionaries to destroy everything that has been painfully collected by generation after generation in the past and to rewrite it in terms of the present. That is the spiritual death from which the West is seeking to escape, and in my submission to you there is no single profession that can give greater help in that struggle than the English-speaking Bar with our training, our instinctive reactions and, if you will, our prejudices. Never let it be thought that lawyers are so inhuman as not to enjoy a substantial amount of prejudice. We have our prejudices as well as others—prejudices rooted as they are in the past, nurtured, as they must be, on the fruits of those battles for individual freedom which our forefathers surely must have thought had been won for all time but which we know only too bitterly are battles which have to be fought continuously again and again if those fruits are not to be lost.

I could give you instances of what I believe to be the genius of the English-speaking peoples to save themselves, by citations from what is going on in England at the moment. My time is running out, and I will content myself with the briefest possible exposition of two matters, one in the criminal field and one in the civil field.

In the criminal field, as you know, since the fifteenth century the writ of habeas corpus has been available to prevent unlawful imprisonment of the individual. In our system for a long time it has been thought that the application having been made to one judge of the high court who had refused the writ, the applicant could go from him to judge after judge and repeat his application in the hope that he would persuade some other judge to grant what the first judge had refused.

It has recently been discovered, or perhaps I should say it has recently been decided, that that is not so and that the application is limited to the first judge. I am glad to say, ladies and gentlemen, that Her Majesty's government have been prompt to announce, and the announcement was made just before I left England, that that revealed deficiency in the law of the liberty of the subject will be remedied by immediate legislative action and that a statutory right of appeal will be created from the decision of the first court.

In the civil sphere we have long been troubled by the way in which land is taken from individuals for public purposes and by the inadequate measure of compensation which is paid to the dispossessed owner. Sir Sydney Littlewood told you yesterday about the manner in which the procedures have been altered in favor of more open disclosure to the public so as to guarantee that these matters are not done in the secret chambers of the Executive Department. I do not mean to repeat that now; I can tell you, on the measure of compensation, that in 1947 the owner whose land was taken from him was deprived of any value which that land had by reason of the prospect of development on it. It was thought that that should go to the state. This was in 1947. By slow but sure steps, public opinion has realized that that was wrong, and a few days before I left England the Royal assent was given to a new bill which restores to the dispossessed owner the full market value of his property. The clock has been put back to the year 1919 because of those instinctive assertions of liberty which, as I venture to say, are the genius of the English-speaking peoples.

That would not have been done so rapidly, so successfully, had it not been for the testimony, in season and out of season, of the Bar and the lawyers who are like-minded with us. The English-speaking Bar, in my submission to you, must act together in this matter.

In June in London of this year the NATO powers were gathered together on the tenth anniversary of the formation of that organization. They held a congress that lasted a week or more in London. In the debates that took place in that assembly, it was manifest that everyone was searching for something more than the justification of a purely military alliance based solely on expediency; that everyone was searching for some unifying principles that were common to all the nations that were assembled there. We can supply that principle in the passionate conviction which all English-speaking lawyers share that life is not worth living unless it is free.

Edmund Burke, again in 1772, said this: "When bad men combine, the good must associate. Alone they will fall one by one, an unpitied sacrifice in a contemptible struggle." May that never happen to the Bar of England, the Bars of the states in your great country, and may it never happen to the peoples whose mouthpiece and voice we are.

Ladies and gentlemen, I have reason to believe that this is the last speech to which you will listen at this meeting; at any rate, in an assembly. I am conscious, humbly conscious of the distinction which is conferred upon me of being, I think, the last speaker, certainly the last of your guests upon your program.

I would like, if I may, to part from you not so much in words of my own but in words of the greatest of all living Englishmen, Sir Winston Churchill. He has said this: "We must never cease to proclaim, in fearless tone, the great principles of freedom and the rights of man which are the joint inheritance of the English-speaking world, and which, through Magna Charta, the Bill of Rights, habeas corpus, trial by jury and the English common law, find their most famous expression in the American Declaration of Independence."

The tragic differences between your people and mine which led to the necessity for that declaration have now faded into history. Old wounds have healed and the scars are so faint that we can disregard them. Can we not now, as two nations, with Bars imbued with the same tradition and principle, go forward together as the protestants of freedom under the law?

Crystal Gazing:

The Problem of Legislative History

by Elizabeth Finley

In this article, Miss Finley discusses the growing habit of courts of relying upon the legislative history of a statute to determine its legal import. In spite of judicial deploring of the practice, Miss Finley writes, it is here to stay, and the lawyer had better be prepared for it. She offers some practical advice on the use of such materials—contrary to the belief of many lawyers, she says, there is a great deal of legislative material available if they know how to dig it out.

"The thing that concerns me is that this language is crystal-clear to you; it is crystal-clear to Mr. Dunn, it is crystal-clear to Mr. Crawford, but you are all looking through different crystals."[1]

This was the wry complaint of Congressman Bennett during a committee hearing on an amendment to the factory inspection provision of the Federal Food, Drug and Cosmetic Act. The hassle at the moment was over the meaning of the word "reasonable" in Section 704 (21 U.S.C. 374).

Thus do words, whose *double entendre* is not restricted to spicy stories, play tricks on us. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." Holmes, J., *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918). As Justice Cardozo said, "They do things better with logarithms."[2] Words and what they mean are a lawyer's big problem. Whether as counselor or advocate, lawyers must continually try to discover what the words of a law mean. What the courts have said they mean and, more particularly in the last twenty years, what the legislature has said they mean.

The idea of quoting legislative materials to prove what the words of a statute mean comes under the general and rather fancy title of "extrinsic aids to statutory interpretation". There have been hundreds of articles on this subject, and though there *are* other "extrinsic aids" (administrative interpretations, executive policy statements, contemporary economic studies, etc.) by far the most frequently mentioned are legislative documents. This little essay is again stressing the obvious; the courts are citing legislative materials as proof of what the law means, and it behooves any lawyer, whether advising or arguing, to be prepared.

True enough, the drafting of statutes is an art. The language should be clear and unambiguous; there should be no question about its meaning. There should be no occasion to have to discover the "legislative intent". There should never be room for diverse opinions of interpretation. All this is true. One might as well say there should be no poverty, sickness or misery in the world.

No matter how expert the draftsman —and there are experts on the congressional staff—he must use words. An added hazard that even a well-drafted bill faces are the stages it must go through in Congress. Many congressmen, with many ideas, offer many suggestions. Government officials and industry representatives appear at hearings and offer suggestions. Amendments are offered in committee or in floor debate. What comes out frequently bears little resemblance to what the draftsman turned in. In the case of the factory inspection act mentioned above, Congressmen Harris and Wolverton quite frankly indicated that if anyone wanted to interpret the law he would be wise to consult the *Congressional Record*. Here is a revealing exchange between the two solons:

> *Mr. Harris.* Would it not be a fair statement to say that . . . the bill would be as we had debated it in the House, which [debate] very thoroughly explains the provision, and which is what we intended to have pass?
>
> *Mr. Wolverton.* That is true. It would then include the interpretation which was given to the bill when it was before the House. The gentleman from Arkansas was very careful to state the intent of the bill . . . [he] went to a great deal of trouble to state

1. Hearings on H.R. 2769, 3551, and 3604 before the House Committee on Interstate and Foreign Commerce, 83d Cong., page 141 (1953).
2. THE PARADOXES OF LEGAL SCIENCE, page 1 (1928).

what the purpose of our committee was.[3]

There has been a good deal of dragging of feet by the legal profession on the use of extrinsic aids. Judges and professors have been particularly vocal. Many practicing lawyers have objected that the use of such material is "unfair". (What they mean is that it is difficult to locate.) But though protesting, in effect they say "legislative history should not be necessary, but it is".

Legislative History . . . Guide to Meaning

Professor Max Radin wailed in 1930, "Are we really reduced to such shifts that we must fashion monsters and endow them with imaginations in order to understand statutes?"[4] to which Professor James Landis replied "The records of legislative assemblies once opened and read with a knowledge of legislative procedure often reveal the richest kind of evidence. . . Legislative history similarly affords in many instances accurate and compelling guides to legislative meaning. . . To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time."[5]

Justice Jackson, although deploring the use of legislative history in statutory interpretation, admitted that, "I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes." He added sadly: "a formal Act . . . is no longer a safe basis on which a lawyer may advise his client, or a lower Court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate. . . Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available."[6]

In *U.S.* v. *Public Utilities Commission of California*, 345 U.S. 295 (1953), Justice Reed delivered the opinion of the Court, and relied heavily upon the legislative history of the Federal Water Power Act of 1920 and the amendments included in the Public Utility Holding Company Act of 1935. "We have examined the legislative history; its purport is quite clear" (page 307). The opinion cites, and quotes from, the committee hearings, the reports and the debates. At one point even the bills, as introduced and as reported, are compared.

Justice Reed, who could fairly be called conservative, may have had some misgivings about placing so much reliance on extrinsic aids. He appears on the defensive when he says (page 315): "Where the language and purpose of the questioned statute is clear, courts, of course, follow the legislative direction in interpretation. Where the words are ambiguous, the judiciary may properly use the legislative history to reach a conclusion. And that method of determining congressional purpose is likewise applicable when the literal words would bring about an end completely at variance with the purpose of the statute".

Justice Jackson concurred in the opinion but protested that "legislative history here as usual is more vague than the statute we are called upon to interpret" (page 320), and he would have concurred "more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress" (page 319). However he does not offer any alternative "analysis of the statute".

In contrast to these "no but maybe yes" statements, Justice Frankfurter writes: "We must, no doubt, accord the words the sense in which Congress used them. . . Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. . . If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded." In speaking of the growing emphasis placed on legislative background, Justice Frankfurter adds "And let me say in passing that the importance that such materials play in Supreme Court litigation carry far-reaching implications for the bench and bar."[7]

It was in 1947 that the Justice pointed out these "far-reaching implications" and in 1949 he listed 134 cases under the heading "Decisions during the past decade in which legislative history was decisive of construction of a particular statutory provision" (335 U.S. 687). Yet the Bar, at least, does not seem quite convinced. Four years later, Justice Jackson in his concurring opinion in *U.S.* v. *Public Utilities Commission (supra)*, again pointed out what he considered the chief evil. The California counsel "had tried without success over a period of four months to obtain the legislative history of §20 of Part I of the Federal Power Act. He obtained it only four days before argument, in Washington at the Library of this Court."

Admittedly this is a tough one. The Federal Water Power Act was passed in 1920, long before legislative histories were being cited extensively. It is undoubtedly true that there was no *compiled* history of the Act, and of the 1935 amendments. But it seemed inconceivable that only "in Washington" could counsel find the hearings, reports and debates on that act. After a survey of libraries in the San Francisco area it turns out that everything cited by the Court, except the bills, *was* available. All of the reports and debates were in several San Francisco libraries. The Court cited a hearing on water power, held in 1918, which was available in the California State Library in Sacramento. All other hearings cited by the Court were in the University of California Library in Berkeley, just across the bay.

Justice Jackson continued that a California library "tried to obtain the material by interlibrary loan from the Library of Congress, but the request was refused". The Library of Congress, according to Mr. Legare Obear, who is chief of the loan section, has several sets of congressional hearings and reports for the past fifty years and will lend them to any qualified library. True, they will not lend bills. In this case it could have been that the Gov-

3. 99 CONG. REC. 11152 (1953).
4. *Statutory Interpretation*, 43 HARV. L. REV. 863, 872.
5. A note on *Statutory Interpretation*, 43 HARV. L. REV. 886, 888, 889, 892.
6. *The Meaning of Statutes*, 34 A.B.A.J. 535, 537, 538 (1948).
7. *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 536, 541, 543 (1947).

ernment attorneys had already borrowed all copies of the material. But if the request was for the "legislative history of the Federal Water Power Act of 1920 as amended" the Library of Congress might be justified in "refusing". Such a request amounts to passing the research chore from the borrower to the lender.

Legislative Histories . . . Are They Only for the Few?

This brings us to the focal point of the controversy. Are legislative histories available to everyone or are they reserved for the fortunate few? First it might be well to define a legislative history of a federal statute. Let us suppose that the law in question is a revenue bill originating in the House of Representatives. A legislative history would consist of (1) the various forms of the bill—as introduced, as reported out by the Ways and Means Committee, as passed by the House, as reported out by the Senate Finance Committee, as passed by the Senate and as agreed to in conference committee, plus any printed amendments and, occasionally, "committee prints", (2) hearings before the House Ways and Means and Senate Finance Committees; (3) reports by these two Committees, and (4) debates on the floor of the House and Senate. This is the basic legislative history. Related, but not always "legislative", can be: messages from the President, reports by bar associations, studies by special investigative committees—legislative, executive, or civilian. Although a bill "dies" with the end of a Congress, a similar or identical bill may be passed in the next Congress. In this case any reports or hearings on the original bill would also be a part of the legislative history.

In a really tight situation all of these materials may be cited, but generally the order of their importance ranks as committee reports first, debates second, then hearings, and last the forms of the bill. (See chapter 50 of Sutherland, Statutory Construction, and 1958 pocket supplement, for an impressive array of citations.)

Was Justice Jackson correct when he said, "Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available"?[8] In one sense he was. For the past twenty years, many law libraries have been *compiling* legislative histories. They have collected all the pertinent material on a law in one place, bound in volumes or kept in files, and *that* is usually what a lawyer means when he asks for a "legislative history". It is certainly a great time saver to have it all in one place, but these collections do not spring fully grown from the halls of Congress. They are painstakingly compiled, usually by a librarian. But no library, however large or however prosperous, has a *compiled* history of every federal law. Actually the practice of compiling histories is a fairly recent development; only in rare cases will you discover a compiled history of any federal law more than twenty-five years old. That does not mean that the legislative history of every law is not available. It is not in a book that you can take from the shelf, or borrow from a library, perhaps, but the material is nonetheless available. There are over five hundred depository libraries scattered through the country; usually there are several in a large city. Although these libraries have the privilege of selecting the classes of publications they wish to receive, it is most unlikely that any sizeable city is without a set of the *Congressional Record* and the Congressional Serial set, which collects the committee reports. Hearings may be only in the state library or the library of a large university. It is true that the bills may not be readily available, but they are usually reprinted in the debates, reports or hearings.

In the *California Utilities* case, *supra*, Justice Jackson recalled that "The practice of the Federal Government relying on inaccessible law has heretofore been condemned". He cited the famous "hot oil" case, which resulted in the establishment of the *Federal Register*, and implied that a "regularized system" of publication of legislative materials should be established, comparable to the *Federal Register* for administrative regulations and orders. Some effort has been made in this field, though not by an official publication. Some histories that have been compiled by law librarians have been published by the Government Printing Office; for instance the Labor Management Relations Act of 1947 and the Atomic Energy Act of 1954. Matthew Bender & Co. is publishing a microcard edition of selected histories compiled by law librarians of the Washington, D. C., area. This company has also published, on microcards, the famous Carlton-Fox collection of histories of the internal revenue laws. The U.S. Code Congressional and Administrative News, by West Publishing Company, has, since 1939, been publishing at least one committee report on federal statutes. For minor problems, one report is frequently enough to settle the question.

Lawyers are beginning to admit that extrinsic aids in the form of legislative histories are important. Most of them, however, seem to be completely at sea about how to find the material. Even many recent graduates are bewildered. Either the law schools do not stress the legislative sections which are in all the standard texts usually used in legal bibliography courses, or the students pick those courses to catch up on their sleep.

Briefly the procedure is as follows:

Elizabeth Finley is the librarian for a large law firm in Washington, D. C. She was Treasurer of the American Association of Law Libraries (1947-1956) and was President of the Law Librarians' Society of Washington, D. C., in 1957-1959.

8. Note 6 *supra*.

From the *Congressional Record* Index get the *numbers* of the committee reports. (In requesting a report always indicate the Congress as: H. Rep. 1066, 83d Cong.) The index will also have given you the page references for the debates, and the Committee which considered the bill. Frequently the report will indicate whether or not there were hearings. If not, the libraries of the Senate and House have published indexes to the printed hearings in those libraries, which are the last word on whether or not hearings are available. (In requesting hearings give the name of the Committee, the bill numbers or subject under consideration, the Congress and session or year.)

This may sound quite involved, but actually it is no more work than tearing the digests apart trying to find a case in point, and frequently the results are more satisfying. If, as sometimes happens, the legislative history sheds no light on the particular phrase in doubt, a lawyer will at least be sure opposing counsel will not suddenly confront him with a persuasive quotation from a report or debate.

It would indeed be a boon to the legal profession if some new "hot oil" case would create such a furor that an "official" publication would be demanded for legislative materials. But it would have to be a really major furor to justify the expense. The printed hearings of the 85th Congress alone (1957-1958) occupy almost seventy feet of shelf space. If complete *compiled* histories of all laws were to be undertaken, there would probably have to be a whole new agency to do the job. There does not seem to be much prospect of such a utopia. For the present, at least, lawyers will just have to take the time and trouble to ferret out the legislative history of any federal law in controversy or be prepared to have the court decide in favor of opposing counsel who *have* taken the trouble.

Albert Sherman Osborn:

Questioned Document Pioneer

by Clark Sellers

In this article, Mr. Sellers sketches the career of Albert S. Osborn, the founder of the modern science of examining questioned documents. Mr. Osborn figured as an expert witness in many famous courtroom scenes including the Molineux murder trial in 1899 and the trial of Richard Bruno Hauptmann for the kidnap-murder of the Lindbergh baby in the 1930's.

The year 1958 marked the one hundredth anniversary of the birth of Albert Sherman Osborn who was destined to blaze a new trail in a work which has made an invaluable contribution to the administration of justice.

Only occasionally does a man come forth whose accomplishments prove to be epochal. Newton, Blackstone, Einstein materially influenced man's thinking. So too did this man Osborn on a far-reaching scale in his own particular field.

Great institutions as well as significant advances in science are almost invariably the lengthened shadow of one individual. A profound thinker, a man of penetrating vision and indomitable courage, of rigid integrity and unremitting zeal, such a person was Albert Sherman Osborn. He, more than all the document experts who preceded him, was responsible for placing questioned document work on a scientific basis. So extensive was this influence that the name Osborn has become legendary throughout the world among handwriting experts, lawyers, judges, investigators and all who deal with questioned document cases.

For nearly fifty years there was scarcely a questioned document matter of importance in the United States and surrounding countries in which Mr. Osborn was not an outstanding figure. The Molineux murder trial, the Rice-Patrick will forgery, the Lindbergh-Hauptmann kidnaping and murder, are but a few of the famous trials in which he was a key witness.

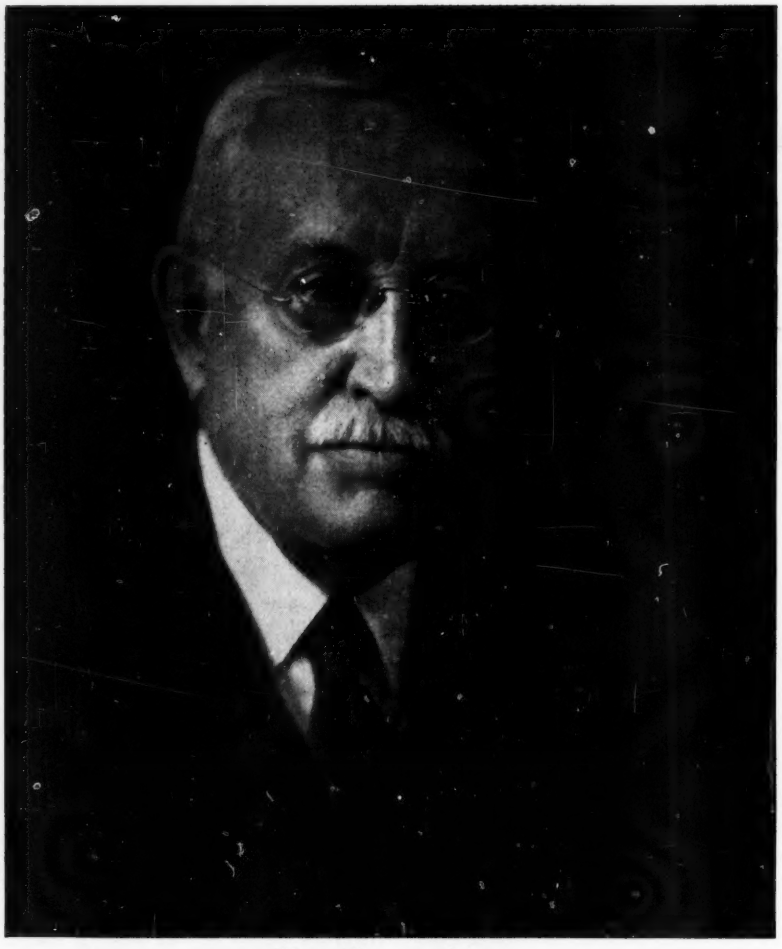
The Molineux Trial . . . Scientific Evidence

One of the first of his celebrated cases was the Roland Molineux trial in New York in 1899. This matter became noteworthy not only because of tremendous public interest, but because it pointed up a vital need for better recognition of scientific approaches to expert testimony concerning questioned documents.

The day before Christmas in 1898, Harry S. Cornish received a package addressed to him at the famous Knickerbocker Athletic Club in New York. The package which appeared to be a Christmas gift contained a tiffany box, a silver bottle holder, and what purported to be a bottle of Bromo Seltzer. Cornish took the package home. Later in the week a Mrs. Adams, who lived at the same house as Mr. Cornish, feeling ill, took some of the contents of the bottle. In half an hour she was dead. An analysis of the bottle's contents disclosed that it contained cyanide of mercury. The whole country was shocked at the crime. In the intense investigation that followed, the main clue as to the sender proved to be the handwritten address on the package. The importance of the handwriting evidence was so great that the District Attorney called in ten leading handwriting experts of the day, including Albert S. Osborn. These experts proceeded to make careful comparisons of the questioned writing with the handwriting of various suspects. Evidence was soon discovered which pointed toward one Roland B. Molineux, a man with whom Cornish had quarrelled. Mr. Osborn and the nine other experts all came to the definite conclusion that Molineux had written the telltale address on the package. This evidence was so compelling that the District Attorney immediately charged Molineux with the murder of Mrs. Adams, and the ensuing trial became a fiercely contested, highly publicized affair.

Mr. Osborn and the other handwriting experts gave carefully prepared testimony, illustrated by photographic enlargements, which virtually amounted to a demonstration that Molineux had written the address on the poison package.

The jury promptly found Molineux



Albert Sherman Osborn

guilty of the murder of Mrs. Adams. There have been few verdicts which have brought forth so much controversy among lawyers, judges and laymen alike. On appeal the verdict was set aside and a new trial granted on the grounds that improper evidence respecting a similar crime had been admitted in evidence (*People* v. *Molineux*, 168 N. Y. 264).

In the subsequent trial before a different court, the prosecution became extremely dissatisfied with the new judge. Although the handwriting was without question the most important evidence in the case, the trial judge nullified its value by his restrictive rulings and derogatory remarks and by excluding the revealing and persuasive photographs the experts had so carefully prepared to assist in demonstrating the reasons for their opinion. Stripped of these effective aids and belittled by the derisive remarks of the judge, the testimony of the handwriting experts was rendered useless. The jury this time brought in a verdict of not guilty.

The contemptuous attitude toward expert evidence in the second Molineux trial and many other similar experiences incensed and aroused Mr. Osborn against hindering, restrictive rulings which made farces out of trials where handwriting expert testimony was offered.

Mr. Osborn was convinced that questioned document testimony merited a full and respectful hearing in court if the ends of justice were to be fully served. As a result he began a campaign to improve the status of document examiners in court. He realized that in order to accomplish this it would be necessary to improve the qualifications of document examiners and to familiarize lawyers and judges with the entire field of scientific document examination and the effective presentation of document evidence in court.

At first progress was slow. But Osborn was not a man to give up. He was determined to do something about a situation which he considered was hampering the progressive application of justice. He soon started to write for publication. Many of his writings dealt principally with various phases of questioned document cases in court and were published in law journals, law reviews and criminology journals. But articles alone were not enough. He turned to writing books.

Today Mr. Osborn is known far and wide for his books dealing with the discovery and proof of the facts relating to disputed documents. His book, *Questioned Documents*, is the classic contribution on the subject. His next publication, *The Problem of Proof*, relates principally to the proof of the facts and their interpretation in court. Next came the *Mind of the Juror*, which is a keen analysis of jury trials and courtroom psychology. His last book, *Questioned Document Problems*, abounds in timely suggestions to the trial lawyers and to the document examiner who seeks to know and prove the facts respecting a disputed document.

It was not by accident that Mr. Osborn became the acknowledged leader in his field. As a youth he was ambitious to improve himself and thirsted for knowledge; as a man he relentlessly sought ways and means to make his life's work truly worthwhile, not for himself alone but for all who served the ends of justice.

Like so many pioneer trail blazers, he was born on a farm. His father and mother, William B. and Jane Cole Osborn, migrated from Sharon, Connecticut, to Grass Lake, Michigan, the birthplace of Albert Sherman Osborn, who was the second of six children.

In Grass Lake young Osborn did the usual farm labor and attended the nearby country school. But farm life held no attraction for him and he soon began to plan for a different line of endeavor. To this end he attended the State College at Lansing, Michigan, where he became interested in the art of penmanship. He felt that if he ac-

quired sufficient skill he could become a teacher of penmanship. With a diligence known only to those who have a burning desire to succeed, he practiced long and arduously and so perfected his skill that he became one of the world's master penmen.

In the meantime he developed a serious eye ailment which threatened his career and made it necessary for him to return to the farm. Fortunately within a year this difficulty was overcome. One day in the late summer of 1882 he came in from plowing and found a letter from the Rochester Business Institute offering him a position as teacher of penmanship. He immediately announced to his family that he had plowed his last furrow. Shortly afterwards he left for Rochester, New York, where he placed his foot on the first rung of the ladder which he was to climb to the heights he afterward attained. It was from this start as penmanship teacher that he extended his interests to the identification of handwriting, typewriting, paper, inks and to the many questions which arise concerning the genuineness of a document.

In those days it was common for attorneys to consult a local penmanship teacher to obtain his opinion as to the genuineness of a signature. As soon as Mr. Osborn became established as a highly qualified teacher of penmanship, lawyers began submitting questioned document problems to him.

Handwriting Testimony . . . Early Problems

From the beginning Mr. Osborn was a true scientist, searching for truth and pursuing it courageously wherever it led, but this was by no means true of all who claimed to be handwriting experts. As was noted in the Molineux trial, at the turn of the last century, lawyers and judges generally regarded the opinions of "handwriting experts" as being no more than guesswork and frequently held them up to ridicule. There was some basis for this attitude. Many of the so-called experts of that day examined writing as an avocation, not as a full-time occupation. They relied upon the general appearance of the writing to form an opinion as to whether it was genuine or forged. The principal tool of their trade was usually only a common reading glass, and the weight of their testimony depended largely upon their claimed experience as handwriting experts rather than upon the reasons for their opinions. Forgery was rampant and for the most part successful, especially when the supposed writer was no longer alive. This was the state of affairs which Mr. Osborn worked so arduously to overcome.

Improvements were so gradual it is difficult now to realize that when Mr. Osborn came upon the scene some sixty years ago, no standards (known writings) for comparison could be introduced in evidence in many states unless they were admissible for other purposes. Reasons for opinions were not permitted unless elicited on cross-examination. Enlarged photographs were frequently excluded, and even the use of a magnifying glass or a microscope was vigorously objected to and the objection often sustained. Imagine trying to give effective testimony under those conditions, irrespective of how correct and well qualified the expert might be!

Mr. Osborn, along with John H. Wigmore, Dean of the Law School of Northwestern University, and other foresighted lawyers and judges fought against these hampering restrictions. Osborn vigorously contended that a trial should be a judicially supervised scientific inquiry to ascertain the facts, not a battle of wits to win. He urged that a document expert be permitted to state the reasons for his opinion on direct examination, emphasizing that an opinion is only as good as the reasons on which it is based. Dean Wigmore summarized the same contention by succinctly stating that expert testimony should be "measured by its convincingness".

In furtherance of his idea that the qualifications of document experts should be improved, Mr. Osborn outlined methodical procedures for examining a document to determine whether it was genuine or forged. He brought to bear scientific equipment from other fields. He devised the comparison microscope by which two objects can be examined side by side under the same degree of magnification. He designed and made numerous precision measuring instruments on glass such as protractors, angle measures, minute height and width measures. These measuring devices, being on transparent glass, can be placed directly on a document, thus permitting the measurements to be made without obscuring the writing. He performed extensive research on questions relating to typewriting, paper and inks. He coined the expression "Examiner of Questioned Documents", contending that the term "Handwriting Expert" referred only to handwriting problems, whereas the qualified document expert also examined a document for numerous other purposes, such as the typewriting, paper, inks, erasures, substitutions, sequence of intersecting strokes, sequence of writing and folds, and age of a document.

Mr. Osborn did not stop with only these contributions toward improving the tools of the profession and bettering the qualifications of document examiners, important as they were. In addition he made numerous helpful suggestions on a variety of subjects, such as improved designing and lighting of

(Continued on page 1334)

Clark Sellers is an examiner of questioned documents, working in Los Angeles. He is the author of many articles on various phases of questioned documents and is a past president of the American Society of Questioned Document Examiners. Mr. Sellers made a trip around the world this year making a survey of questioned document work in other countries.

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"They Keep Christmas All the Year"

There are some lawyers of the expansive type whose very appearance contributes good cheer wherever and whenever they are present. Unfortunately they are few. The pursuit of our profession does not give its votaries the outward show of perennial Santa Clauses. The proverb "a good lawyer, a bad neighbor" probably expresses a view based upon our exteriors. Perhaps the fact that we ask pay for getting men no more than they are entitled to leads them to make us the target for such slings and arrows. If so, we are never going to escape them by proclaiming our own virtues. We must have the virtues that our calling demands. If that does not give us good "public relations" no self-praise will.

Some of us do keep Christmas all the year. Many a legal aid society lawyer day after day, year in and year out, gives to the poor services of a value much greater than his society can pay for. He knows that justice should be free and does his best to make it so. Few indeed are the lawyers who can collect a fee for every matter undertaken. From the early days of our country the lawyers have shouldered the burden of the defense of the poor. At first every lawyer accepted his share of the court's assignments. After the practice of the criminal law had become a specialty the specialists continued by themselves to carry this burden of the whole Bar. Each day that each gave in court was a Christmas present, and a very handsome one, to his client.

Times are changing and all of the work of bringing justice to the poor need no longer be done by a small fraction of the Bar. In many places the burden is spread among a host of contributors to legal aid societies and defender organizations, many of which give help not only in criminal but in civil matters. By contributing to them each lawyer can vicariously fulfill his personal obligation. Perhaps people would like us better if we devoted ourselves to going a-wassailing at Yuletide but what we have professed requires that we keep Christmas all the year.

Duke University Legal Aid Clinic Closed

After more than twenty-seven years of operation as a pioneer enterprise linking legal aid and legal education, Duke University Legal Aid Clinic has closed its doors. *The Legal Aid Brief Case*, the official publication of the National Legal Aid and Defender Association, states:

> This is sad news indeed, especially for hundreds of low income citizens of the Durham area who were helped by the Clinic. It is a major setback in the efforts to develop a clinic experience for law students.

The Clinic was founded to stress practical training in connection with law school study, in consonance with the wishes of Mr. Duke, who, in providing financially for the University, had emphasized the importance of practical training.

How practical the training was is attested by students who have taken the course, by lawyers for whom they have worked, and by those who, interested in the general improvement of legal education both in this country and abroad, have studied the Clinic as a model of its kind.

The course was elective, running for a year and giving two hours of credit per semester toward a law degree. From one third to one half of the students elected to take it. It operated with a staff of one part-time Director (who taught other courses); two full-time assistants, both lawyers, serving a sort of postgraduate internship; three part-time lawyer assistants, who handled litigated cases and supervised instruction in the practical side of the law, such as searching titles, preparing trial briefs, etc.; and two secretaries. Over the years the Clinic handled approximately 13,000 cases.

No case was handled for clients who could pay a fee. The Clinic operated on the principle that it is not merely paying cases that teach realistically how to think like a lawyer; how to interview a client or a witness; how to diagnose the legal questions involved in a case; and how to handle it best from a practical standpoint.

The closing of the Clinic coincided with the retirement of Professor John S. Bradway, who as its Director was

principally responsible for its original organization and for its conduct over the intervening years. Under his guidance the Clinic achieved national recognition. It does not seem credible, and Professor Bradway himself would doubtless be the last to claim, that he was indispensable to the operation of the Clinic. In other courses at Duke and elsewhere, the retirement of a professor is not usually fatal to the course he teaches.

At the present time special efforts are being made by the legal profession, practitioners, judges and legal educators alike to emphasize training for professional responsibility. A Legal Aid Clinic is admirably suited as an instrument for such training. That the Duke University Legal Aid Clinic should go out of existence just at this time is therefore all the more regrettable.

Editor to Readers

The first time that I walked into our suite in the Americana Hotel in Miami Beach last August, I was greatly pleased to find it occupied by one of the Nestors of the American Bar Association, a favorite of all who know him, Frank W. Grinnell, of the Massachusetts Bar (Boston). We had a delightful visit including supper, and this made a red letter day for me. A note from him the other day enclosed a galley proof of "A Message from Montana and Ralph Waldo Emerson", both of which we feel should be shared with our readers:

Thanks for sending me the San Francisco *Bar Briefs* which entertained me. In paraphrasing what I said in the AMERICAN BAR ASSOCIATION JOURNAL, they put into my mouth the statement that "75 per cent of the words used by lawyers were unnecessary", when Charlie Beardsley, of Oakland, California, was the one who said it. They seemed to doubt that my wife said "law seemed to consist largely of the word 'said' ". But she did say it. She was rather a lawless person at times and liked to entertain herself and others as Lord Brougham did when he said that "law is that which is plausibly put forward and vigorously maintained". There is a *limited* amount of fact in both statements.

I enclose a galley proof for the October issue of the *Massachusetts Law Quarterly*, which will be out next week (I hope). As the circulation of the *Quarterly* is largely limited to Massachusetts, it has occurred to me that you might want to use this to provide a bit of variety. To me it is interesting and the more it is read the better, so I send it along for use or for the waste basket.

What I am meditating about is the Connally provision in the United Nations Charter and the Attorney General's address in favor of its repeal. When I get through "meditating", I may perhaps send you an article under a title something like this: "An Experience in Meditation—on messages from Montana, Emerson, George Washington, Andrew McLaughlin, Learned Hand, Demosthenes and Hans Christian Anderson's story of 'the Emperor's Clothes' ".

The midnight discussion I referred to was with Holman and a bunch from Oklahoma. Whether I will find time to do it and whether it will be worth while, I don't know yet, but I think the proposal about the Connally proviso is a very questionable one when the brass tacks are considered. I am all for the ideal of "peace through law", but idealists need to ponder on the inscription on the third gate referred to by Emerson.

F.W.G.

A Message from Montana and Ralph Waldo Emerson

Recently in an Eastern newspaper I noticed the following editorial from the *Montana Standard*.

"MORE TIME TO THINK"

"President Eisenhower believes that high government officials ought to have more time to sit back and think about their jobs. Although this gives administration critics a fine opportunity to make wisecracks, the idea deserves to be taken seriously.

"One tragedy of our day is that so little time is devoted to thought and so much to conferences, crash programs, hasty actions born of pressure, the preparation of reports, and that great favorite of the promotion man, brainstorming. The belief that long-range and productive thought can come from solitary meditation has lost favor in the rush to get things done through cooperative effort, team play and idea via committee.

"The idea of working cooperatively is a good one. But it is not the only way to get things done. Few basic inventions have been committee jobs; literary gems don't come from conferences. The man who takes time to meditate alone may not measure up to the standard image of the American production giant, but he is a vital cog in the industrial and social machine.

"The President and the men around him do need more time to think. So do we all. When and if we ever come to regard private meditation as a waste of time, we shall have lost appreciation of an enriching and productive enterprise."—*Montana Standard*

It is refreshing to find such a public reminder of a great need of thoughtful laymen and of lawyers today—however unpopular it may be.

At intervals of a needed period of doing nothing, while enjoying what Seneca described as the stable "serenity" of high mountains which he compared to philosophers, we read Ralph Waldo Emerson's "Representative Men". Emerson was a meditator. In his lecture on Plato (written in 1867) he described him as "the great average man" with "a great common sense" out of whom "come all things that are still written and debated among men of thought". In this connection he said:

"His circumspection never forsook him. One would say,

he had read the inscription on the gates of Busyrane—'Be bold,' and on the second gate—'Be bold, be bold and evermore be bold,' and then again had paused well at the third gate—'Be not too bold.' "

These lines (and particularly the balancing inscription on the third gate) seemed to call for "private meditation" referred to in the Montana editorial which has been quoted.

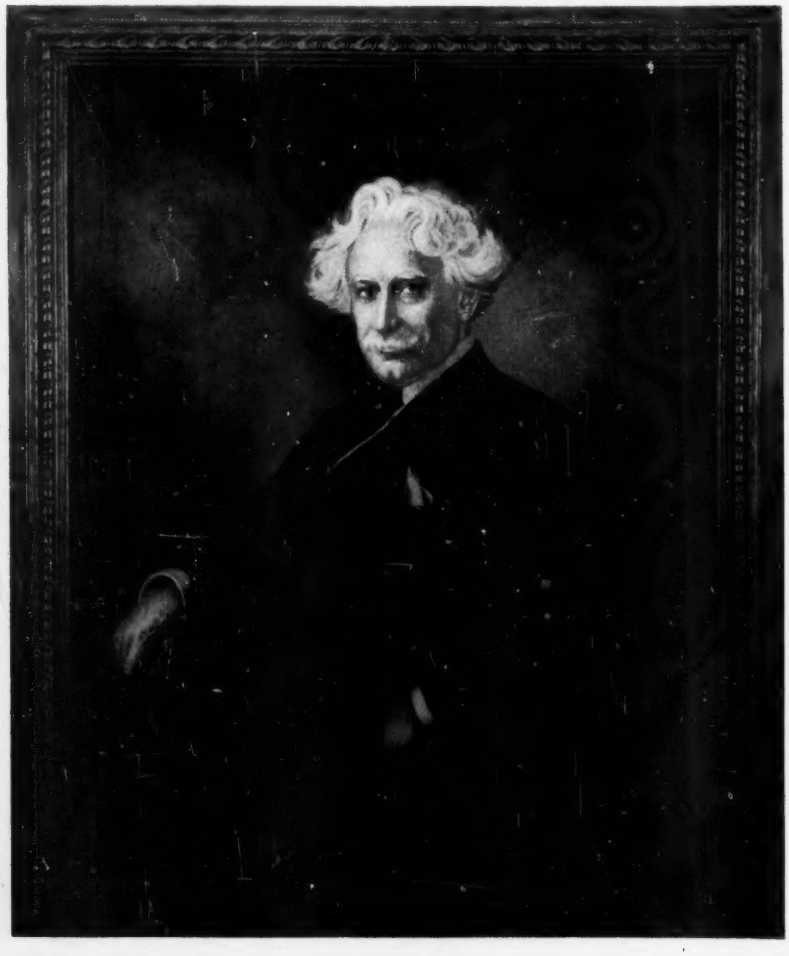
I, then, went to the meeting of the American Bar Association at Miami where I listened to addresses on certain matters of far-reaching importance to the American people. This was followed by a somewhat serious midnight discussion with some brethren from the West which lasted until 1:30 A.M.

I have been meditating ever since and I am still looking for convincing light on aspects of a current problem which may be discussed in a later *Quarterly* if further meditation seems to justify such action.

F. W. Grinnell

American Bar Foundation Receives New Portrait of William Nelson Cromwell

A new portrait of William Nelson Cromwell by the well-known artist, Charles Baskerville, has recently been hung in the reading room of the library of the American Bar Foundation. The painting was commissioned by the New York City law firm of Sullivan and Cromwell and was presented to the Foundation by Arthur H. Dean, senior partner. It replaces a framed black and white photograph of Mr. Cromwell and adds a great deal to the appearance of the library.



The Foundation's library is named after Mr. Cromwell to record appreciation for his generous bequest to the American Bar Association "for library and research purposes", $400,000 of which served as the nucleus of the building fund for the American Bar Center. The Cromwell Library was dedicated on February 22, 1955, following the adjournment of the Midyear Meeting of that year. Mr. Dean spoke at the dedicatory exercises about Mr. Cromwell's legal career and in 1957 published privately his biography, *William Nelson Cromwell, 1854-1948, an American pioneer in corporation, comparative, and international law.*

Two brass plaques near the portrait read as follows: "The Cromwell Library in memory of William Nelson Cromwell 1854-1948 whose generous bequest made possible this library"; and "William Nelson Cromwell, by Charles Baskerville, was presented to the American Bar Foundation in 1958 by the law firm of Sullivan and Cromwell in memory of one of the original partners of their firm."

Ross L. Malone, President of the Foundation at the time the portrait was received, wrote to Mr. Dean and accepted the gift on behalf of the Board of Directors of the Foundation. He commented upon the excellence of Mr. Baskerville's work, expressed thanks and stated that the Foundation was sending Sullivan and Cromwell color photographs of the portrait and that portion of the reading room where it hangs, together with replicas of the two bronze plates as a token of appreciation.

Agreement Is Reached on Internal Security Resolutions

At the 1959 Annual Meeting in Miami Beach last August, two Special Committees of the Association submitted reports to the House of Delegates, along with implementing resolutions, dealing with passport control procedures and federal employee security. The resolutions as drafted by the Committees were substantially opposed to each other, and, on the suggestion of the Board of Governors, were referred back to the Committees.

The committees, the Committee on Individual Rights as Affected by National Security and the Committee on Communist Tactics, Strategy and Objectives, worked out a joint report which was presented to the Board of Governors at its meeting on Thursday and Friday, October 29 and 30.

The new resolutions, which bear the imprimatur of both Committees, were approved by the Board and thus now represent the official policy of the American Bar Association. The resolutions are as follows:

I.

1. RESOLVED, That the American Bar Association recommend to the Congress the enactment of legislation containing the following principles with respect to the control of travel abroad by United States citizens:

(a) The Secretary of State should be authorized to refuse to issue a passport to any person or to restrict or revoke a passport of any person as to whom it is determined on substantial grounds by a preponderance of the evidence that he knowingly engages in activities calculated to further the International Communist movement and having a tendency to endanger the national security or tending seriously to impair the conduct of the foreign relations of the United States.

(b) If a passport is denied, revoked or restricted for any reason stated in paragraph (a) hereof, the applicant or holder should be informed in writing of the reason, as specifically as is consistent with considerations of national security and the conduct of foreign relations, and shall have and be informed in writing of the right to a hearing before the Passport Hearing Board.

(c) The Secretary should be required to establish within the Department of State a Passport Hearing Board, at least one member of which shall be a lawyer, to review the denial, revocation or restriction of a passport. The members of said Board shall be independent of and have no responsibility related to the issuance, denial, revocation or restriction of passports other than their duties as members of said Board.

(d) In proceedings before the Passport Hearing Board, the Secretary should be required to establish and enunciate publicly the procedural safeguards available whereby the rights accorded to an individual are protected. In such proceedings, the individual shall have the following rights which shall be included in the rules which the Secretary shall make public:

(1) To appear in person and to be represented by counsel.

(2) To testify in his own behalf, present witnesses and offer other evidence.

(3) To cross-examine witnesses appearing against him at any hearing at which he or his counsel is present and to examine all other evidence which is made a part of the open record.

(4) To examine a copy of the transcript of the open record and upon request to be furnished a copy thereof.

(e) The right to confront and cross-examine all witnesses and to examine all documentary evidence considered by the Board shall be accorded, except where the Secretary of State or Acting Secretary of State, personally, shall certify that information, or the sources of information, or the investigative methods pertaining to the individual is believed by him to be reliable and cannot be disclosed without serious damage to national security or the conduct of foreign relations. The Secretary or Acting Secretary shall furnish to the individual during the course of the proceedings a fair written résumé of such information certified by him to be as complete as consistent with national security or the conduct of foreign relations.

(f) The Board shall take into consideration the individual's inability to challenge information of which he has not been advised in full or in detail or the individual's inability to attack the credibility of sources that have not been disclosed to him.

(g) Review procedure in the United States District Court for the District of Columbia shall be provided. In such review the court shall determine whether the decision of the Secretary is based on substantial evidence in the record and that procedural requirements have been met.

2. RESOLVED, That the American Bar Association authorize the chairmen of the said special committees jointly to appear before the committees of the Congress to state the position of the Association in conformity with the foregoing Resolution.

II.

WHEREAS, The American Bar Association believes that employment by the Federal Government is a privilege and not a right; and

WHEREAS, The American Bar Association believes that the American public is entitled to the services of loyal and suitable employees without regard to whether employed in sensitive or nonsensitive government positions; and

WHEREAS, The American Bar Association believes that all employees of the government are entitled to due process of law in the consideration of loyalty and suitability; and

WHEREAS, The American Bar Association believes that there is not at present adequate comprehensive legislation in this field;

NOW THEREFORE BE IT RESOLVED, That the American Bar Association recommended to the Congress the enactment of comprehensive legislation covering Federal Civilian Employee Loyalty and Security Discharge Procedures and procedures to apply to application cases under which employment is refused on loyalty or security grounds. Such legislation shall establish specific standards and criteria defining sensitive and nonsensitive government positions and prescribe adequate administrative procedural safeguards for the hearing and review of such cases, including a broad, but not unlimited right, of confrontation.

RESOLVED, That the American Bar Association authorize the chairmen of the said special committees jointly to appear before the committees of the Congress to state the position of the Association in conformity with the foregoing Resolution.

The Rule of Law:

It Needs Governmental Authority

by John W. Apperson • *of the Tennessee Bar (Memphis)*

Mr. Apperson believes that "peace through law" is illusory until there is an international organization with judicial, legislative and executive power to enforce the peace. He advocates a federation of the countries belonging to the North Atlantic Treaty Organization as a beginning.

A definite movement toward lawful order for the world is now under way.

In recent years there has been an increasing number of articles and addresses on the need for the establishment of the rule of law throughout the world. Many of these articles have appeared in the JOURNAL, including the article by Judge Robert N. Wilkin entitled "What Are We Fighting For? Juridical Order", which appeared in the January and February, 1951, issues; Henry R. Luce's "Our Great Hope: Peace Is the Work of Justice", which appeared in the May, 1957, issue; the undelivered address of Judge John J. Parker entitled "We Must Go Forward: Law in the World Community", which appeared in the July, 1958, issue; the Annual Address of Past President Charles S. Rhyne, which appeared in the October, 1958, issue; and the article by Thomas E. Dewey in the November, 1958, issue entitled "A Sacred Goal: Peace Under Law". An address of Dean Erwin N. Griswold of Harvard Law School entitled "Law and Peace", was delivered before the Institute of International Order at the University of Colorado on March 26, 1958. The book, *World Peace Through World Law*, by Grenville Clark and Louis B. Sohn, has recently been published. This article is submitted as another in the rule of law series.

This stirring of interest in this vital subject is especially gratifying to many of us who have been preaching this need for years, such as Clarence Streit, Will L. Clayton, Elmo Roper, and the late Judge Owen J. Roberts and Robert P. Patterson. However, we have advocated going even further in the Atlantic Community and setting up there a federation of the NATO nations, which would give control to a central government over a few things which transcend their national boundaries, such as armaments, foreign affairs, money, communications and commerce. I would be willing to settle for the rule of law as a start if this, without our whole objective, could be achieved in the beginning. I submit, however, that the rule of law advocated must first be established in the free world among the NATO nations as a pilot and an example and that there must be a federation of those nations in order that the law to be applied among them may be enacted, interpreted and enforced. I say this because they are a small group relatively advanced in the rule of law with a community of interest based on the Judeo-Christian doctrines. Obviously, federation is not possible now on a worldwide basis, and the volunteer system now prevailing for formulating, interpreting and enforcing our so-called international law does not have sufficient authority or potency. Sir Alfred Zimmern stated that "International law is a grandiose name for the etiquette of sovereign states in a lawless world." Furthermore, the law to be enforced should be applicable to and enforceable against individuals as well as against nations.

With a few exceptions, the authors of these articles and addresses plead for the need for the rule of law among nations but are unwilling to advocate what is needed to really accomplish the objective, namely, a relinquishment of some of our sovereignty to a central government with authority to enact, interpret and enforce the law. They do not seem to realize the distinction between union and alliance. Messrs. Clark and Sohn, in their *World Peace Through World Law*, advocate a giant step in this regard which would encompass all members of the United Nations. This would seem to be impossible of accomplishment within the foreseeable future.

The first article, entitled "What Are We Fighting For? Juridical Order", was written by Judge Robert N. Wilkin, a now retired United States District Judge for the Northern District of

Ohio, an author of several books on jurisprudence and legal philosophy and a former member of the Board of Editors and Advisory Board of the JOURNAL. In that article Judge Wilkin gave a brief review of history to show that for centuries it has been recognized by the highest authorities that juridical order was fundamentally necessary for the pacification of human society; that freedom exists only when given the sanction of law; that the absence of law is anarchy; that in World War I and since, juridical order is what we have fought for; that in our Declaration of Independence it was stated that all men "are endowed, by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among men..." He defined "Juridical Order", showed how necessary it is in our world of today and how the issue has not been clearly seen. Juridical order, he states, "affords the maximum possibility of peace and freedom. It is the only system that offers peace with freedom and freedom with peace." He states, however, that "It does require ... some organization to sustain it and enforce the sovereignty of law. Such organization must therefore be vested with legislative, executive and judicial powers within the sphere of its jurisdiction." He further states:

> Man's scientific contrivances have exceeded his civil accomplishments. They act on a global base while he lives in a provincial state. His inventions are therefore without adequate social control. Force will prevail over reason and evolution will give way to revolution and destruction unless international anarchy is subjected to juridical order.
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> Unfortunately the legal profession as a body has not shown conspicuous leadership in the efforts for lawful order for the world. The bar associations generally have been ultra conservative and highly critical. They have offered few constructive suggestions...

The next article was the address made before the State Bar Association of Connecticut by Henry R. Luce, Editor-in-Chief of *Time*, *Life* and *Fortune*, entitled, "Our Great Hope: Peace Is the Work of Justice". In his address, Mr. Luce stated:

> For example, the problem of law is central to the question of so-called foreign aid. An expanding world economy is a vital interest of the United States. But how to bring it about? We are momentarily baffled.
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> * * *
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> The business of this American generation is not to establish world government. Our business is to establish, through an ever larger part of the world, a rule of law enforceable within that area and defensible against any barbarians who may choose to remain outside. That, as I see it, is our task during the next twenty years.

Mr. Luce seems almost unknowingly to be arguing for a conversion of the Atlantic Pact into a federation so that the expanding world economy so vital to the interest of the United States and an enforceable rule of law may be established in "an ever larger part of the world" (free world), and be "defensible against any barbarians who may choose to remain outside" (Soviets and Red Chinese). He is no doubt convinced that it is becoming ever more necessary that we must have among the free nations "a more perfect union" than the present alliance existing under NATO. This same problem faced the thirteen American colonies. Their leaders were convinced that a "more perfect union" was needed than existed under the League of Friendship as the alliance under the Articles of Confederation was called. Those leaders procured the calling of a convention at Philadelphia and thus evolved the Constitution of the United States based upon the federal principle.

Next came the address prepared for delivery by the late Judge John J. Parker, published posthumously, entitled "We Must Go Forward: Law in the World Community", in which Judge Parker, in speaking of the practical need for some international organization for the establishment of a world order based on law, said:

> ... Such organization does not mean the building of a super state as the World Federalists advocate, but it does require three things, which, I submit are eminently practical, viz.: (1) adequate judicial machinery for the settlement, on the basis of reason, of disputes of an international character; (2) adequate legislative machinery for bringing to bear the intelligence of mankind upon the solution of international problems; and (3) adequate organization of force for the preservation of peace and the enforcement of law.
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> * * *
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> Our American Union furnishes fine illustration of cooperation for the purposes of collective security. No one of our states would be able to protect itself effectively against foreign aggression but collectively they possess a power that is today greater than that of any other nation in the world. This power is used to preserve the peace and enforce the law throughout the Union as well as to protect against dangers from without. Some such pooling of force for purposes of collective security and to enforce the rules of international law and the decrees of international tribunals is essential to the success of any international organization. Order rests upon reason and force. Force without reason is tyranny but reason without force to make it effective is anarchy... We do not expect peace in domestic affairs without force to preserve it; and it is idle to think that we can have peace in international relationships on any other basis.
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> ...If unity is not achieved on the basis of reason and law, it will eventually be achieved through force; and the only hope of defeating those who would unify the world on the basis of force is for those who believe in the reign of law to rise above the narrow limitations of nationalism and support an intelligent organization or world life based upon law and righteousness.

The Judge admits that there must not only be a court to enforce the law, but that there must be some sort of legislative assembly for the purpose of enacting the law to be enforced. He further admits that there must be some force behind the decisions in order to enforce the law, and then he finally concludes that if this unity is to be achieved so that there can be a reign of law, the people who believe in the reign of law "must rise above narrow limitations of nationalism and support an intelligent organization of world life based upon law and righteousness".

Past President Charles S. Rhyne, in his Annual Address, stressed the need of a rule of law in the world. He vividly demonstrated the perils facing the free world. He made an eloquent plea for the need and urgency to strengthen the free world. He, like

many, apparently is not in favor of a world government at this time, such as advocated by Messrs. Clark and Sohn. However, he failed to advocate a conversion of the Atlantic Pact into a federation. He does not seem to realize the need of a central government with authority to enact, interpret and enforce the rule of law. He advocates what many of our present-day statesmen have been advocating, the tried but failing application of international law, without any form of government to support it. The conclusion I draw from Mr. Rhyne's Annual Address is that the already existing international law be applied on a larger scale with a more elaborate court system. He still leaves enforcement of his courts' decisions to voluntary and popular approval. There is no governmental authority suggested with power to enforce decrees. Nor does he provide for laws to be applicable to individuals. To enforce his decrees against an unwilling nation would require war.

In the November, 1958, issue of the JOURNAL appears Mr. Thomas E. Dewey's very concise article in the rule of law series entitled "A Sacred Goal: Peace Under Law". He submits that the rule of law should begin with the free nations; that international law has failed; that only those nations which want to abide by a decree of an international court do so. Mr. Dewey says:

> At the outset we must recognize the dominant fact of the world in which we live: Peace through law can only be achieved between nations which desire it.
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> * * *
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> If the free nations cannot settle their arguments in peace and good will they will surely fall apart into petty, defenseless disputants. If we fall apart, we shall all die or be conquered.
>
> United, we can preserve the physical and moral strength necessary to maintenance of the overwhelming power which alone will prevent war.
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> Even as we develop the peaceful machinery of the free world, we shall be learning better how to adapt its power to the situation which may some day arrive when Communist nations become sufficiently civilized to join the peace-loving people of the world. This might come in our time or not for many decades. When it does come, a system of compulsory settlement of international disputes under law should be so fully developed that it can be easily applied to the newcomers. There must also be developed by that time the means of enforcement which the world is not yet willing to establish.

Judges Wilkin and Parker realize the need for some form of organization with authority to enact, interpret and enforce the rule of law. Judge Parker uses our federal system as an example of a way to accomplish this result. Mr. Luce says an expanding world economy is of vital interest to the United States and that our business is to establish a rule of law enforceable in a larger area of the world. He says though that "we are momentarily baffled". With this pessimistic conclusion I disagree.

There are many organizations working to strengthen NATO, such as the Atlantic Union Committee, Federal Union, Inc., and The International Movement for Atlantic Union.

At the Atlantic Congress held in London, June 5 through 10, 1959, the Political Committee passed, among others, the following resolution:

> Believing in the desirability of improving the means of settling disputes among member states proposes the constitution of a Study Group to investigate new methods in this field, including the creation of a NATO Court of Justice.

This resolution was adopted largely through the influence of past President Charles S. Rhyne who was a delegate to the Congress and a member of the Political Committee.

Duke University has established a Rule of Law Center with Mr. Arthur Larson in charge. From October 27 through November 24, 1958, at Cleveland College of Western Reserve University, a series of five lectures was delivered under the topic "Law in a Troubled World".

Agencies of the United Nations, of the International Law Association and of the American Bar Association are engaged in efforts to formulate a code of law for the air and outer space. A commission of the United Nations is at work on a code of international law. The American Law Institute has just published a tentative draft of The Foreign Relations Law of the United States. The International Bar Association meeting in Germany in July, 1958, took action for a conference in April, 1959, of "leaders of the Bar from the free world to discuss means whereby the judicial process could be developed to facilitate economic progress and assure survival through maintenance of peace". Such a conference is favored by The United States International Cooperation Administration. During October, 1958, an International Congress of Judges met in Rome to discuss the possibility of a system of international courts, the jurisdiction of such courts and the training of judges.

John Wright Apperson was born in Memphis in 1896 and was admitted to the Tennessee Bar in 1920. He received his education at Memphis University School and at the University of Virginia (LL.B. 1921). He is a member of the National Council of the Atlantic Union Committee.

The barbarous ideologies of the recent dictatorships have caused lawyers, judges and statesmen to appreciate the interrelations of law and value and the necessity for the rule of law.

Under the leadership of Past Presidents Rhyne and Malone, the American Bar Association has been brought to the support of the movement for world law. And now President Randall is continuing that leadership and support. Such a movement is gratifying to those members who have been advocating such action for many years.

It would now be profitable for

readers of the JOURNAL to review some of the articles formerly published by the JOURNAL.

This is unquestionably a movement which the legal profession should lead. Out of fifty-five delegates who attended the Constitutional Convention in Philadelphia, twenty-six were lawyers or had studied law. The ball is rolling. We of this generation may yet see come true the prophecy of Tennyson made in about 1842 when in his *Locksley Hall* he saw the "Vision of the World, and all the wonder that would be":

Till the war-drum throbb'd no longer, and the battle-flags were furl'd
In the Parliament of man, the Federation of the world.
There the common sense of most shall hold a fretful realm in awe,
And the kindly earth shall slumber, rapt in universal law.

American Association of Law Libraries

To Publish Index to Foreign Legal Periodicals

The American Association of Law Libraries has embarked on a publishing enterprise which is unique in nature and promises to be of worldwide importance and epochal in the literature of law. Homer D. Crotty, of Los Angeles, California, a past Chairman of the Section of Legal Education and Admissions to the Bar, explains this important publication project.

The American legal profession has been fortunate indeed in being served well by the American Association of Law Libraries, the professional organization of law librarians of our country and a leader and example to law librarians of our country and a leader and example to law librarians elsewhere in the world. This tribute has been due for many years. Without the *Index to Legal Periodicals* which has been published as a volunteer effort by this Association since 1926, access to our American and British legal periodical literature would be difficult, even chaotic.

Once again, the Association has embarked upon a very important project, the publication of an *Index to Foreign Legal Periodicals*. This will be distributed on a worldwide basis. The index in English of the contents of 250 of the leading periodicals on foreign and comparative law will be made available to us regardless of the original language in which the articles are published. The extensive foreign investments of American business require legal advice on many subjects—taxation, corporation law, labor conditions, restrictions on business, status of aliens, etc. Where is the American lawyer to find the answer to these problems at the present time? The new *Index* will be invaluable as a research aid in this difficult field. No longer must we make frustrating efforts to discover legal developments and jurisprudential thinking abroad. In foreign countries legal periodicals are the place in which so much new law finds its inception and in which the present status of the law is discussed and analyzed.

The *Index to Foreign Legal Periodicals* will be published in quarterly issues. At the end of each of the first four years, a cumulative volume will be published. At the end of the fifth year, a five-year cumulation will replace all the earlier volumes and issues.

The primary language of the *Index to Foreign Legal Periodicals* will be English. Contacts have been established with scholars throughout the world in order to assure the international usefulness of the *Index*. Announcements of the project have found universal approval. The editorial work will be under the general management of K. Howard Drake, of London, Librarian and Secretary of the well-known Institute of Advanced Legal Studies at the University of London and Secretary of the Selden Society. The Association's supervisory efforts will be in the hands of a Committee of which William B. Stern, of the Los Angeles County Law Library, will be the Chairman.

An enterprise of this size cannot be started without adequate financial support. The legal profession should be grateful to the Ford Foundation, which has made a substantial financial grant to the American Association of Law Libraries for the *Index to Foreign Legal Periodicals*. But the project will be successful only if it finds the necessary support on the part of our Bar and those of other countries. The lawyers of our country should be leaders in the support of this worthwhile project.

Subscriptions for the year 1960 and subsequent years may be placed with the Treasurer of the American Association of Law Libraries, William D. Murphy, Librarian, Kirkland, Ellis, Hudson, Chaffetz & Masters, 2900 Prudential Plaza, Chicago 1, Illinois, at $25.00 per year.

HOMER D. CROTTY
Los Angeles, California

Committee on Unauthorized Practice of the Law

Opinion 1959-A
Estate Planning

This Committee has received inquiries concerning the propriety of the conduct of corporations and individuals who are not lawyers but who, through advertisements, brochures, orally or otherwise, solicit legal work or hold themselves out to the public as being available to give legal assistance in the field of estate planning or to do the whole job of planning an estate.

The phrase "estate planning" has come into existence in recent years to refer to the orderly arrangement of an individual's assets so as to provide most effectively for the economic needs of himself while living and of those dependent upon him after his death. At the outset it should be recognized that there are certain lay activities which are legitimate aspects of estate planning and which do not involve legal work, but which are in the nature of an analysis of the facts and assets of an estate in relation to economic needs, and may extend to giving general information as to laws affecting the disposition of estates, though without any specific application thereof to a particular estate or individual situation. These activities may be properly performed by persons who are not lawyers, and are discussed later in this opinion. In general, however, pursued to its proper conclusion, estate planning necessarily involves the application of legal principles of the law of wills and decedents' estates, the law of trusts and future interests, the law of real and personal property, the law of taxation, practice in the probate and chancery courts, or other fields of law. When such is the case, the work involved in estate planning includes legal research, the giving of legal advice or the drafting of legal instruments.

There can thus be no question that estate planning, except where it is in the nature of an analysis of the facts and assets of an estate as above described, involves legal work and constitutes the practice of law. When engaged in by an individual who is not a lawyer, or by a corporation, it is the unauthorized practice of law. Nor does it become any the less the practice of law because the suggestion is made that the legal advice given or legal work done should be reviewed by an attorney. It is well settled that both corporations and laymen are prohibited from practicing law directly, and that they may not practice law indirectly by hiring lawyers to practice law for them. Accordingly, neither corporations nor laymen may engage in estate planning by soliciting the legal work involved and then hiring lawyers to perform it. This is also the unauthorized practice of law. In addition, under Canon 47 of the Canons of Professional Ethics of the American Bar Association no lawyer shall permit his professional services, or his name, to be used in aid of, or to make possible, the unauthorized practice of law by any lay agency, personal or corporate.

It is elementary that under Canon 27 lawyers are forbidden to solicit legal employment by circulars, advertisements, or otherwise. Thus, no lawyer may solicit legal work in the field of estate planning or be employed to do such work for a corporation or a layman which does. But the public could not be protected by prohibiting the lawyer from soliciting legal work in the field of estate planning, if at the same time laymen and lay agencies were permitted, in any guise, to advertise a claimed legal competence in this field. It should be clear, therefore, that the holding out by any lay agency to the public, directly or indirectly, overtly or subtly, of its willingness to perform legal services in the field of estate planning is itself the unauthorized practice of law. Also, no lay agency may hold itself out to the public as willing to do the whole job of "estate planning" without becoming engaged in the unauthorized practice of law.

In addition, the lawyer-client relationship requires a duty of absolute loyalty to the client, and undivided allegiance. Under Canons 6 and 35 of the Canons of Professional Ethics the lawyer cannot permit his professional services to be controlled or exploited by a lay agency intervening between him and his client.

Also, under Canon 34 lawyers may not divide fees with laymen, and this principle applies to fees for legal work in the field of estate planning. Moreover, the sharing by a layman of a lawyer's fees constitutes the unauthorized practice of law.

Illustrative of the treatment of the subject in the courts is the decision of the Superior Court of Cook County, Illinois, in *Chicago Bar Association* v. *Financial Planning, Inc.*,* decided March 21, 1958, in which the court held that certain estate planning services involved the giving of "legal advice on some of the most important problems which can arise during a man's lifetime and after his death", adding that "Even if this advice were confined to tax savings alone, it still

*This case is reported in 26 LAW WEEK 2662, and 24 UNAUTHORIZED PRACTICE NEWS, No. 2, page 29.

would amount to the practice of law . . ." and "the contention that the advice is comprised merely of suggestions, and is always subject to be reviewed by a lawyer, is no excuse for the conduct of the defendants. The practice of law should be confined to lawyers without the interposition of unauthorized practitioners who solicit this business directly or indirectly."

The decree in this case permanently enjoined the defendants, their agents and employees from:

(a) Giving legal counsel and advice,

(b) Rendering legal opinions,

(c) Preparing, drafting and construing legal documents,

(d) Preparing estate plans which embody legal analysis, counsel and advice,

(e) Holding themselves out as persons who prepare estate plans embodying legal analysis, counsel and advice,

(f) Charging and collecting fees for legal counsel, advice, or services rendered by them, or their agents, or employees,

(g) From practicing law in any form, or holding themselves out as having a right to practice law, or soliciting employment to prepare estate plans embodying legal analysis, counsel and advice, or from charging, or collecting fees, or payments for legal services rendered by said defendants and each of them or their agents, or employees.

It is not intended by the opinion of this Committee to proscribe activities of those groups which serve various fields related to estate planning unless they involve the performance of legal services as outlined herein. Activities geared to motivating the individual concerned to do something about his affairs and to seek the advice of his own lawyer as early as possible, preferably from the outset, with regard to the development of an over-all estate plan, are in the public interest. Advice on matters of law with respect to a particular factual situation of the individual concerned, however, must not be given.

The activities of lay groups described above should conform to the standards of propriety set forth in the several Statements of Principles developed through the conference method between the American Bar Association and various business and professional groups. Moreover, because of the shadowy borderline between an analysis of facts and assets of an estate and the application of legal principles to them, it is clearly within the spirit of the several Statements of Principles that the activities of these groups should be performed in close cooperation with the client's own attorney. It is contemplated that any disputes which may arise with respect to the activities of such business and professional groups shall be governed by such Statements of Principles. The understandings reached in these Principles have served to encourage the public to seek proper legal guidance, the lay groups not to transgress upon the sphere of activity properly reserved for the legal profession, and to bring about better understanding and cooperation between these groups and the Bar.

F. TROWBRIDGE VOM BAUR,
Chairman, *Washington, D. C.*

WAYLAND B. CEDARQUIST,
Chicago, Illinois

E. N. EISENHOWER,
Tacoma, Washington

JONATHAN F. ELLS,
Winsted, Connecticut

TERRELL MARSHALL,
Little Rock, Arkansas

H. H. PERRY, JR.,
Albany, Georgia

RAYMOND REISLER,
Brooklyn, New York

Association Calendar

Annual Meetings

Washington, D. C.	August 29-September 2, 1960
St. Louis, Missouri	August 7-11, 1961
San Francisco, California	August 6-10, 1962

Board of Governors Meetings

Midyear Meeting, Chicago, Illinois	February 18-20, 1960
Spring Meeting, Washington, D. C.	May 15-17, 1960

Midyear Meeting

Edgewater Beach Hotel, Chicago, Illinois	February 18-23, 1960
Administration Committee	February 18, 1960
Board of Governors	February 18-20, 1960
Group Meetings	February 20-21, 1960
House of Delegates	February 22-23, 1960

Regional Meetings

Portland, Oregon	May 22-25, 1960
Houston, Texas	November 9-12, 1960

Books for Lawyers

SENATOR JOE McCARTHY. *By Richard H. Rovere. New York: Harcourt, Brace and Company. 1959. $3.95. Pages 275.*

Joseph Welch, the popular attorney from Boston, was recently treated to a tour of Europe to promote the motion picture, *Anatomy of a Murder.* While there, Welch remarked to Art Buchwald that Europeans erroneously remembered Joe McCarthy as an American Hitler. Welch explained that McCarthy had never suffered from such ambitions. Joe had simply been enjoying a good romp.

Richard H. Rovere makes the same point in his recent book, *Senator Joe McCarthy:* "Politically, he never tried to organize outside the existing party structure." Well then, what did the man try to do?

February 9, 1950, marked the birth of McCarthyism. The unknown young Republican Senator from Wisconsin filled a speaking engagement on that day at Wheeling, West Virginia, before the Ohio County Women's Republican Club. The information that he flourished before those ladies germinated a beanstalk which lifted him into national controversy, abuse and, perhaps, death.

He flatly claimed to know the names of people who were Communists and who were then working in the State Department. Since the text was not transcribed, there is now some doubt as to the exact number of Communists that he claimed to have located. Other details of his speech are also shrouded in mystery. At any rate, he quickly consolidated his headlines and began erupting the salvos of press releases which were to bring our Chief Executive out of his bunkers with a handkerchief tied to his mashie.

If one is able to read about McCarthy without bile choking one's gorge, this account of his career proves out to be a rich vein of spit-in-your-eye individualism. And the people loved Joe.

McCarthy was a hero to many persons. Bill Buckley concluded that McCarthyism was a "precise weapon in the American arsenal" and a movement that men of "good will and stern morality" (whatever that means in this context) could "close ranks on". Rovere, ordinarily a critic of McCarthy, states that Joe was our first "hero" since F.D.R. In January, 1954, a Gallup Poll indicated that 50 per cent of the American people had a generally "favorable opinion" of McCarthy. From hindsight it cannot be said that he only appealed to oil barons, supermen and "brink" jumpers.

Rovere quotes a passage from Nietzsche, "Here is a hero who did nothing but shake the tree when the fruit was ripe. Do you think that was a small thing to do? Well, just look at the tree he shook." (Rovere, by the way, is an excellent writer himself.)

Using Nietzsche's standard, Joe McCarthy was a big man. Our nation was never stronger. The people were solidly behind Eisenhower. The economy was churning into a period of vast expansion. Yet Joe McCarthy caused our country to pause and, like some aimless anthropoid, sit down and scratch clumsily among its public parts for what this figure of speech requires me to call "red fleas".

What part did we lawyers play in the affair? Did our profession stalwartly defend the virtues? Rovere's analysis reveals that the law failed. If that is true, what did save us? Well, here is one theory.

Fear surges across a nation like a tide. Rovere neglects the part that good humor and tolerance played in the finale of the McCarthy affair. When Joe stopped scaring the Senate, it was simply because Senators no longer took him seriously. Did the wit of lawyer Welch cause the tide to ebb? Why, then, would Jack Benny not have served as well? In short, neither Rovere nor anyone else really seems to know why the tide went out on Joe McCarthy.

Will there be another Joe McCarthy? It would seem to be inevitable. Always, there have been local demagogues. Improved mass communication facilities now make it possible for such men to magnify their effect. Television converted Little Rock into a national scandal. And betrayal will always be available as a theme.

McCarthy's roots were planted in a pumpkin field and fertilized by the suspicion of Alger Hiss's treason. The fear of treachery in sacrosant greenhouses picked Pandora's box. Will we ever be safe?

Along came Joe McCarthy, snarling about whitewash and infecting the soft comfort of our lives with his tales of spies and hidden agents. The public was ready to believe. All through America, a witch hunt was welcomed as acceptable employment for other men. The Messiah had arisen and the panic was on. If the reader has forgotten that panic, let him reflect on Hanson Baldwin's statement of February 28, 1954, that, "Whether President Eisenhower realizes it or not, Senator McCarthy is now sharing with him command of the Army." The story of General Zwicker bore out Baldwin's opinion.

It can happen again and it will happen again. Are we any more ready for the next one?

ROBERT COULSON
New York, New York

COURTROOM STRATEGIES. *By Ben W. Palmer. New York: Prentice-Hall. 1959. $8.50. Pages 393.*

In this book a wise, experienced and devoted lawyer offers counsel and advice to his brethren of the Bar out of his great store of professional learning and lore. About ten years ago the author published in the JOURNAL a series of articles on the philosophy of law, the theories and ideals of jurisprudence. He now offers the profession a very practical discussion of the requirements of modern practice and procedure. Implicitly and explicitly the work recognized that the practice of law is both a science and an art, and that therefore the practitioner must be

exact and also artful. But the word *strategies* should carry no connotation of trickery.

Because the law is administered by and for individuals of variable personalities and under conditions that vary from case to case, the practice can not be an absolutely exact science; but nevertheless, because its aim and purpose are truth and justice, the practitioner must be forthright and just. The artfulness of the practice does not comprehend fraud or deception.

When the author speaks of succeeding at the Bar, it is clear that he has in mind professional success. To any one whose sole aim is financial success, the accumulation of wealth, Mr. Palmer no doubt would recommend some other occupation—manufacture, trade or finance. He nevertheless recognizes that a law office must make money to survive. Modern life is so commercialized that profitable operation is an element of even professional success. He therefore discusses such problems as *office management, fees* (how to get them) and *clients* (how to get and keep them).

Senior law students will no doubt read the book with avidity. It discusses the problems uppermost in their minds, such as *where to locate, in a city or a town, in partnership or alone, as a clerk in some large firm, in the legal department of a corporation,* or *in government service.* Many young lawyers have been disappointed and offended by older practitioners who lacked time (or maybe professional courtesy) to discuss such problems. Here Ben Palmer offers, if not the answer, a very thorough analysis, valuable suggestions and sound counsel.

Active practitioners will find some practical suggestions and good counsel in what is said about *meeting with client, record of conferences, investigation and preparation for trial, conduct of trial, treatment of witnesses, investigation and treatment of jurors, argument to jury, and argument to appellate court.* There is of course advice as to some details which lawyers of experience do not need. The book offers counsel of perfection—suggestions for the important and complex cases; but there are cases that do not require all the recommended investigation and preparation. But the lawyer who would succeed must know how to prepare and present the most important case.

Even the retired lawyer or judge will read the book with interest and pleasure. It will create in him a reminiscent mood. He will check his experience by the book and the book by his experience. It will stimulate the elder lawyer's principal pastime, reflection. And when some younger lawyer comes to him for counsel on some professional problem, instead of risking an impromptu opinion, he can direct the applicant to *Palmer on Courtroom Strategies* or how to be a successful lawyer.

The book has an attractive format, is written in a pleasing style and the text is enlivened by many apt and attractive quotations.

ROBERT N. WILKIN

Cleveland, Ohio

REPORT OF THE ARDEN HOUSE CONFERENCE ON CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY. *Philadelphia: The American Law Institute. 1959. $3.00. Pages 315.*

A remarkable book. A significant elaboration of the agreements of an important conference. A collection of thoughts on two of the legal profession's pressing problems—the need to improve the competence of the profession; the need to develop a greater sense of professional responsibility. These statements might be dust jacket blurbs but they also accurately annotate statements about the Arden House Conference Report, *Continuing Legal Education for Professional Competence and Responsibility.*

I write this review with enthusiasm for I was present at the Conference and listened to and participated in its discussions. Reading the *Report* reinforces the sense of urgency I felt on the completion of the Conference, an urgency for the Bar to do more in the future than it has in the past.

The book's theme, which runs consistently throughout five chapters and nine appendices, a total of 300 pages, is indicated in the introduction. There it is pointed out that in education for competence there must be sought an intensification, expansion and acceleration of what now exists; in education to qualify lawyers to discharge professional responsibilities outside of practice and to incline them to participate in public service there are needed imaginative planning and new methods. But there is optimism on this because:

> A good lawyer cannot help being something more than a technician. By training and experience he possesses certain qualifications which create a demand for his services in diversified fields, some of them quite remote from practice. Generally speaking, a man does not choose the bar as a career unless he has the inherent ability and willingness to be useful in wider fields of endeavor. If he is to fulfill his inclinations and comply with the demand for his services, he must have an education broader than that needed in the comparatively narrow confines of practice. The opportunity to obtain it should be offered him by the organized bar. And it should be such as to instill an appreciation of the accepted standards of the profession and to encourage participation in the discharge of professional and public responsibilities outside of practice. Should it be suggested that this is asking a good deal of the profession and its individual members, the answer is that if our way of life and government are to survive, this demand must be made and must be complied with.

In the text of the *Report,* first comes a discussion of the future development of education for greater competence in practice. The need stems from the increasing complexity of society and its controlling standards and, as pointed out by Robert J. Blakely, Vice President of the Fund for Adult Education, from the realization that education must continue and can never end. It has always been true that educated men keep on educating themselves perennially and it is now coming to be recognized that this is of even greater importance today for lawyers. A critique of past and present efforts to improve professional competence and a discussion of the requirements of a sound educational program for the future are included. The methods of organizing such a program, the essential responsibility on a national scale of the organized Bar and its designated agent, the Joint Committee on Continuing Legal Education of The

American Law Institute and the American Bar Association, are discussed in considerable detail. Speaking on these matters in an address to the Conference, Dean Erwin Griswold emphasized that no future program will be adequate unless the Bar is willing to face up to the necessary cost:

> In the legal field, the task of continuing legal education has in the past been largely done—I was going to say—on a shoestring. But perhaps I should say shoestrings, because it has been done in many places but usually on what might be called an amateur basis.

Chapter III suggests the parts of the program for which law schools are peculiarly equipped, expresses the hope that they will accept a permanent role but warns that they must not participate in continuing legal education so extensively as to interfere with the performance of their primary duty to prepare young men and women for admission to the Bar.

The most provocative part of the *Report* is in the chapter on professional responsibility. Here under the inspiration of Judge Learned Hand, John Lord O'Brian and Judge Charles E. Wyzanski, Jr., who addressed the Conference, significant suggestions are made which deserve thoughtful study. A reading of the addresses and of the amplifying discussion in the *Report* is a stimulating experience and gives one hope that at last the profession is awakening to its full responsibility. The *Report* indicates the breadth of this responsibility in establishing ethical standards in advocacy and in the whole field of private practice, in seeking to improve the courts, the administration of justice, the legislative process and its product and in many other areas. All of these are delineated, but how to bring the proper sense of responsibility home to the individual lawyer and secure his active acceptance are not so clearly indicated. The *Report* pins its hope on education. Greater competence through broader and deeper education should lead, the *Report* suggests, to greater interest and participation in matters for which the legal profession as an institution is responsible.

The *Report* is carefully documented and a complete bibliography is included. In the appendices are illustrations of a variety of continuing legal education programs, a description of the services offered by the Joint Committee on Continuing Legal Education and a proposal for a so-called "Four Course Program" which should prove helpful to any interested group or individual. I predict that this volume will be a standard reference for years to come in the field of continuing legal education for professional competence and responsibility.

CHARLES W. JOINER

University of Michigan
Ann Arbor, Michigan

TAX ASPECTS OF REAL ESTATE TRANSACTIONS. *Revised Edition. By Martin Atlas. Washington, D. C.: Bureau of National Affairs. 1959. $12.50. Pages 258.*

An excellent guide through the tax labyrinth of real estate transactions.

That considerations of equity and common sense have little to do with the fixing of tax liability the author evidences by countless illustrations:

> Take for example an individual who owns an apartment house. Should it be owned by a corporation or personally? . . . And when the time comes to sell how should the sale be arranged? The difference between the right and wrong way may mean that the total Federal income tax can take more than 90% of the profit or as little as 10%.

The taxpayer who follows the wrong path and lands in the 90 per cent quagmire can hardly be expected to feel that he has been fairly treated by the Government. Whether in any given case the course charted by the law, the regulations and conflicting court decisions, is so tortuous and obscure that even under the most expert guidance he has gone wrong;—or whether the taxpayer bulls his way through without advice;—the 90 per cent result is equally catastrophic.

The necessity for such guide books as that of Mr. Atlas is a challenge to the tax system and its administration.

Is it essential that transactions ending in the same result, because of mere variations in form, should result in such fantastic variations in tax? How can the Government expect wholehearted cooperation from its taxpayers when the regulations and law are so obscure that even the most expert at times can only guess at their meaning?

As one of the greatest of all American jurists, Judge Learned Hand, said of the tax statutes, their words "dance before our eyes in a meaningless procession: Cross reference to cross reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of" leaving "only a confused sense of some vitally important but successfully concealed purpose" which can be understood "only after the most inordinate expenditure of time". (Judged Learned Hand, "Thomas Walter Swan", 57 *Yale L. J.* 167, 169 (1947).)

A tax which depends, as does the income tax, on self-assessment by the taxpayer, requires for its success taxpayer confidence in the fairness of its administration.

Why shouldn't the Revenue Service be as eager to see that a taxpayer does not overpay as it is to see that he does not underpay?

Why, in cases where the end result is the same, should the ignorant or ill-advised taxpayer, who followed the wrong course, be treated differently from the one who followed the smart course? When the taxpayer has the right to elect, for example, the installment basis of returning income on a real estate sale and mistakenly fails to do so on his return, why shouldn't the Service make the correct election for him—*i.e.*, the election which is to his advantage and which he would have made if properly advised—or at least permit him to do so on the audit of the return?

Take the case of an owner of land acquired subject to a mortgage who transfers the property to the mortgagee to satisfy the debt. Although he loses his entire equity in the property, he will be deprived of the ordinary loss deduction if he accepts even $10.00 of additional consideration and be relegated to a capital loss. Why shouldn't the Revenue Service give him the benefit of the course he would

have followed had he read the Atlas book?

In the litigation which has just arisen in Michigan over the constitutionality of its new use tax law, the newspapers report that the Attorney General has designated three of his staff to defend and three to attack the constitutionality of the law—in order that the court may be fully advised. Might not such a technique within the Revenue Service tend to eliminate some of the inequities which arise under the present system? The vast majority of taxpayers accept the rulings of the Revenue Service without challenge in either Tax Court or a Federal District Court.

The good will that would be inspired by laws and tax administration which leaned over backward to protect the ignorant taxpayer would, in all likelihood, more than offset the loss of revenue feared by the Government. It would, moreover, create an atmosphere in which the temptation to dishonesty would lack the self-justification of those who now look on the tax system as a kind of a game in which the Government takes advantage of the taxpayer and the taxpayer of the Government.

Regardless of this additional incentive to taxpayer honesty, Congress could certainly gear its tax rates to raise sufficient revenue without reliance on the mistakes of the ignorant and unwary.

Until such a millenium of tax law and administration is reached, taxpayer and lawyer alike will find the clear, concise and well-classified book written by Mr. Atlas an invaluable guide in real estate transactions.

MORRISON SHAFROTH
Denver, Colorado

THE NATURE AND FUNCTIONS OF LAW: AN INTRODUCTION FOR STUDENTS OF THE ARTS AND SCIENCES. *By Harold J. Berman. Brooklyn, New York: The Foundation Press, Inc. 1958. $7.50. Pages 662.*

In 1758, Blackstone urged that every educated gentleman should have "a competent knowledge of the laws of that society in which we live". It was this thought which has given a continuing impetus to insight in the law for those engaged in undergraduate and graduate study not necessarily directed to law as a profession. Such a view has guided Professor Berman in the preparation of this composite text for use by students of the arts and sciences. It would also not be amiss for the law student, and the practitioner for that matter, to take the time to ramble through these pages to see the legal forest now and again instead of just the trees of daily study or practice.

In grappling with the definition of law at the outset, Berman gives the student a brief survey of contemporary schools of legal philosophy as an aid to an understanding of the place of law in society. He does this with no thought of placing one school above any other but with the hope for a synthesis which guides the selection of material for the volume. He would not stress origins nor sanctions of the law but its functions so that the student can gather wherein law plays a vital part in his life. "To see law as a particular kind of institutional process is to lay the foundation for an analysis of the social functions of legal activity and legal relations."

The functions which he finds are served by the law and which his contents illustrates are how to maintain social equilibrium, how to protect expectations, how to mold social thought, feeling and behavior and how to maintain historical continuity and consistency of doctrine.

There follow chapters on the jurisdiction of courts and civil and criminal procedure prior to and during trial by way of examples of law as a process of resolution of disputes.

Law as a process for maintaining historical continuity and doctrinal consistency is shown by cases in the law of torts on the subject of manufacturers' liability. Reasoning by analogy of doctrine and statute are discussed through the apt choice of material from the pages of Llewellyn and Levi.

Contract law serves to point up the aim of the law as a process of facilitating and protecting voluntary arrangements with the material taken largely from the works of Lon Fuller.

The concluding part chooses the field of labor law to illustrate how the law is a process for resolving acute social conflict. Here the work of Archibald Cox is drawn upon as the principal source.

The volume in its entirety can best be summarized by a quotation Berman chooses from Stone which emphasizes what the work aims at and what, we add, it amply fulfills. Says the then Dean Stone: "I would not have the layman receive professional training in law, nor would I have institutions devoted to liberal education give courses in law such as are given in law schools, but there are certain fundamental notions of the nature of law, certain facts relating to its history and development, and certain principles which underlie its efficient administration which should become a part of the intellectual equipment of every intelligent citizen."

Professor Berman also draws on occasion from his studies in the field of Soviet law for pointed contrasts with our own system.

LESTER E. DENONN
New York, New York

TENURE IN AMERICAN HIGHER EDUCATION: PLANS, PRACTICES, AND THE LAW. *By Clark Byse and Louis Joughin. Ithaca: Cornell University Press. 1959. $3.50. Pages 212.*

The granting of tenure to university professors is a moral and legal commitment on the part of institutions of higher learning to the principle that faculty members should be able to teach and act free from a large number of restraints and pressures which might otherwise inhibit independent thought and action. Tenure is the legal guarantee of academic freedom.

It is wonderful evidence of the vigor of academic freedom on the campuses of America that the law on the meaning of tenure is so little developed. The spirit of fraternal associations and the sense of scholarship which have united the administration and faculty of the overwhelming majority of American colleges has retarded the development of the law of tenure. In fact this excellent work by Professor Byse of the Harvard Law School and Louis Joughin

of the American Association of University Professors (AAUP) is almost the first work of its kind on this ever more important topic. The first part of this work is a survey of the tenure plans of eighty colleges and universities in California, Illinois and Pennsylvania—institutions representing a good cross section of America's traditional units of higher learning. The second part of this most valuable volume studies the law of tenure and makes recommendations for its implementation.

The plans and practices on tenure in the surveyed institutions indicate "a bewildering assortment of criteria and procedure governing acquisition and termination of tenure" (page 9). Only twenty-four of the eighty institutions have adopted the plan advocated in 1940 by the AAUP and the Association of American Colleges—*i.e.*, that each professor should receive tenure after a probationary period of not more than seven years. The rest of the institutions grant tenure to associate and full professors according to university statutes which frequently leave large areas of ambiguity both as to the acquisition and the termination of tenure.

Authors Byse and Joughin quite properly call upon colleges to spell out more adequately at least the essentials of academic due process. If universities hope to recruit able professors they must let them know on what terms they are hired. A teacher who takes his doctor's degree at thirty, serves six or seven years as an instructor or assistant professor and is then denied tenure or not retained confronts a serious crisis in his career. His failure to achieve tenure may well make it impossible for him to continue anywhere in the academic world. Similarly, a professor dismissed from a tenure post faces the probable ending of his professional career.

There has been little litigation on the acquisition of tenure. Some universities insert a disclaimer clause in their agreement with faculty members from which arises substantial doubt whether a contract actually exists between the parties. Professor Byse, writing on the law of tenure in the second part of this study, takes a firm view that the university and the professor should have a contract between them, the terms and enforceability of which should be entitled to judicial review. The basic difficulty with this position is, of course, as Mr. Byse points out, that a professor may resign at will upon reasonable notice but a university must retain a professor on tenure until his death, retirement, dismissal for adequate cause or until the university suffers a serious financial crisis. Despite the one-sidedness of the contract the author makes out a case (which is difficult to reject) for "vesting in the courts rather than in the governing boards the ultimate power of determining the meaning" (page 108) of the terms for the acquisition and termination of tenure.

Judicial review of university trustees' decisions will not, however, come easily or quickly. Many governing boards have ruled that their decisions concerning tenure are "final". Can a court review this "final" decision without usurpation of the authority of its makers? Does a professor have a right to a review which he may have impliedly waived?

University trustees, counsel for institutions of higher learning and all university administrators should study carefully the fifteen recommendations of this pioneering, perceptive and unique contribution to a neglected subject. The "health" of the relations between the administration and faculty of the nation's colleges and universities will be greatly improved if the institutions together with their faculties candidly explore and implement the notion of tenure which is the moral and legal buttress of academic freedom.

ROBERT F. DRINAN, S.J.
Boston College Law School

GUIDE TO FOREIGN LEGAL MATERIALS. FRENCH, GERMAN, SWISS. *By Charles Szladits. New York: Oceana Publications, Inc. 1959. $11.00. Pages 599.*

There are few things so essential to the lawyer who must prepare a case involving foreign law as a knowledge of the legal materials of that jurisdiction, its laws, reports, books, and its legal methods and hierarchy. Such knowledge helps place the practicing lawyer and his expert witness upon common ground and produces teamwork in the ascertainment of the foreign law as well as greater comprehension by the court.

However, unless the lawyer is versed in the foreign language and has been legally trained in the foreign jurisdiction, it is unlikely that he will possess this knowledge. How can he acquire it? What research must he make? What libraries must he visit? These are the troublesome queries that rise to haunt the careful practitioner during his preparation for the trial of a foreign law case.

A most welcome answer to these questions, at least in so far as French, German and Swiss laws are concerned, is now at hand in the form of a *Guide to Foreign Legal Materials—French—German—Swiss,* by Charles Szladits, written for the Parker School Studies in Foreign and Comparative Law. This excellent series of the Parker School of Columbia University, which is designed to provide American lawyers with the tools necessary in pursuing the study of comparative and foreign law, reaches a new note of success with the publication of this book.

Each of the three fields is treated separately, although the form of treatment is similar. The sources of law of each of these jurisdictions and the manner of enactment of statutes and decrees are described. The position occupied by customary law, a field often overlooked by the common law lawyer, is also covered. The importance of case law and the authority of precedents, which it is often erroneously assumed, no longer carry any weight in code or civil law countries, are likewise explained. The author wisely covers the court organization in his discussion of case law, so that a real evaluation may be made of the treatment accorded to precedents by each of the tribunals.

In connection with the discussion of case law it is interesting to note that in France "judicial decisions are in fact followed and they form precedents of law" (page 26); that in Germany "case law" is "for all practical purposes a source of law" (page 137), and that in Switzerland "the Federal Tribunal con-

siders precedents as source of law" (page 389). This is a realistic refutation of the misconception that in the jurisprudence of the civil law countries precedents are no sources of law at all, and it is a justification for the position taken by the late Judge Jerome Frank in *Usatorre* v. *The Victoria* (172 F. 2d 434). In the last mentioned case Judge Frank took exception to the testimony of an expert witness regarding Argentine law who gave "little or no attention to Argentine decisional material", and the opinion of Judge Frank contains interesting footnotes regarding the importance of precedent, particularly the quotation from Professor Friedmann (*Legal Theory* [1944] 295), to the effect that "Both the slavish obedience of [civilian] judges to codes, and their freedom from precedent are largely a myth. . ."

The recognition given to doctrinal writings and the importance of general principles in equity and other auxiliary sources, such as natural law and sense of justice, complete the author's introduction to the discussion of the repositories of law which opens for the researcher the approach to the written works and the sources from which may be derived the answers to legal problems. Here are separately discussed and listed the bibliographies, the legislative materials, the official and unofficial reports, the law reviews, encyclopedias, legal dictionaries, treatises, textbooks, manuals and periodicals, as well as the books in the English language on the laws of each of the jurisdictions under discussion.

Methods of citation of research are set forth in detail, and copies of pages of some of these books are reproduced to ease the task of those who must venture into an unknown field.

A list of abbreviations and an amazingly complete index to authors and titles, as well as to subjects, bespeak the infinite patience and care which the author took to make this book a living and useful tool in foreign law. A final chapter on the use of the foreign legal materials gives advice on the most likely difficulties to be encountered in dealing with the foreign law. This is done by a discussion of the relative position of source materials, an outline of the approach to cases, and the arrangement of each legal system.

The entire book cannot help but increase the reader's familiarity with the comparative method of law in each of the jurisdictions studied. Although the works included were brought down to July, 1958, recognition is given to the mass of new publications, which apparently stream in in those countries as they do in ours, by a stated intention of taking notice of these in the future in the pocket part to this book. It is difficult to imagine that any American lawyer will hereafter dare to venture into matters involving French, German and Swiss laws without making good use of Mr. Szladits' *Guide.*

BENJAMIN BUSCH

New York, New York

INCOME TAX DIFFERENTIALS. A SYMPOSIUM. Princeton, New Jersey: *Tax Institute, Incorporated. 1958. $6.00. Pages 258.*

The somewhat cryptic title refers to the fact that the income tax law does not tax all classes of economic income uniformly and therefore creates differentials between the different taxpayers who receive such income.

This symposium was conducted by the Tax Institute in Princeton, New Jersey, in November, 1957. At the time the symposium was being set up it appeared that a general tax reduction was in the offing, and much of the material was directed towards the manner in which the reduction should be effected. However, before the meeting date, the Russians launched their Sputnik I which caused us to re-examine our need for military expenditures, resulting in an indefinite postponement of any tax reduction.

The material in this volume is of rather uneven quality. Many of the speakers merely enumerate the specific provisions in a certain area of the law, pointing out how differences in tax results arise from seemingly inconsequential differences in method. These papers amounted to little more than a check list.

There is, however, some thoughtful discussion of tax policy. Of the material in the latter class, the contribution of Robert Eisner of Northwestern University stands out rather conspicuously. Appraising various proposals for tax treatment of investment, Eisner is one of the few speakers in the symposium who is not interested merely in tax relief. He begins by exploding the proposition that more favorable treatment of investment income to the individual will necessarily result in greater investment opportunity, and therefore greater prosperity, for the economy as a whole. He examines the effect on investment of the capital gains tax, the progressive income tax, the corporation tax and the so-called double taxation of dividends, and draws some provocative conclusions. Apparently they were provocative to his listeners who, in the discussion period that followed, almost uniformly rejected his suggestion that tax reduction was not the solution to all economic problems.

Professor Stanley Surrey of Harvard Law School discusses in his paper the effect of various income tax differentials in eroding the income tax base. That is, he points out that the nominal high rates progressing to 91 per cent are really not so fearsome because of the possibilities of reducing the effective rate on economic income through depletion deductions, capital gains tax and tax exempt interest. He also shows how administrative differentials, for example, the failure to withhold tax on dividends and interest as compared to the withholding on wages, in effect create differentials in treatment because a higher proportion of the latter are returned as taxable income.

Most of the other papers are directed toward more favorable tax treatment for various classes of taxpayers, presumably clients of the speaker. The ultimate issue to be drawn from all this is whether in reshaping tax policy, assuming the present level of revenue must be maintained, the effort should be towards a general rate reduction made possible by a rigid elimination of present differentials in treatment or merely by realigning differential provisions. In emphasizing the difficulty of reaching these decisions, Kenneth W. Gemmill, the chairman of the symposium committee, points out that "one

(Continued on page 1329)

Review of Recent Supreme Court Decisions

George Rossman

EDITOR-in-CHARGE

Attorneys . . . *discipline*

In re Sawyer, 360 U. S. 622, 3 L. ed. 2d 1473, 79 S. Ct. 1376, 27 U. S. Law Week 4543. (No. 326, decided June 29, 1959.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed.*

This case overturned the suspension from practice for one year of a lawyer in Hawaii.

Disciplinary charges were filed by the Bar Association of Hawaii against the petitioner after a speech she made in the Islands about a Smith Act conspiracy trial in which she was serving as defense counsel. The speech was made at a meeting sponsored by a committee for the defense of Jack Hall, one of the Smith Act defendants. It was alleged that "petitioner engaged and participated in a willful oral attack upon the administration of justice . . . and by direct statement and implication impugned the integrity of the judge . . . and thus tended to also create disrespect for the courts of justice and judicial officers generally. . ." The evidence tended to show that the petitioner called the trial "horrible and shocking" and declared that: "There's no such thing as a fair trial in a Smith Act case. All rules of evidence have to be scrapped or the Government can't make a case." She also said that "a federal judge sitting on a federal bench permits [a witness] to testify about 27 years ago, what was said then . . . here they permit a witness to tell what was said when a defendant was five years old" and she added, "There's no fair trial in the case. They just make up the rules as they go along." The trial judge was not mentioned by name. These remarks were considered to constitute "gross misconduct" by the Territorial Supreme Court which heard the disciplinary charges. The Court ordered the petitioner suspended from the practice of law for a year. The order was upheld by the Court of Appeals.

Mr. Justice BRENNAN announced the judgment of the Supreme Court and delivered an opinion in which the CHIEF JUSTICE, Mr. Justice BLACK and Mr. Justice DOUGLAS concurred. Noting that lawyers have a constitutional right to criticize courts, the opinion viewed the petitioner's speech as a general criticism of Smith Act trials and not as a personal attack upon the trial judge or what he was doing or failing to do at the trial in progress. At worst, the opinion argued, petitioner's speech amounted to an implication that the trial judge was taking an erroneous view of the law—something that appellate courts do every day. The opinion touched on, but did not decide, a further charge that petitioner was guilty of misconduct in interviewing one of the jurors shortly after completion of the Smith Act trial; the territorial court had said that petitioner's speech was enough to support its suspension order.

Mr. Justice BLACK noted that he agreed that the charges against the petitioner had not been proved but that his agreement should not be considered as indicating a belief that Hawaii has a specific law authorizing the petitioner's suspension or that such a law would be valid if it existed.

Mr. Justice STEWART, concurring in the result, declared that, while lawyers have standards of propriety and honor that they must follow, there was not enough in the record here to support the charges made against the petitioner.

Mr. Justice FRANKFURTER, joined by Mr. Justice CLARK, Mr. Justice HARLAN and Mr. Justice WHITTAKER, wrote a dissenting opinion which took the position that the petitioner's entire speech was a "direct attack on the judicial conduct" of the Smith Act trial that "inescapably impugns the integrity of the judge". The opinion also objected to the "strong intimation" in Mr. Justice BRENNAN'S opinion that the petitioner's suspension might be unconstitutional. She was not constitutionally entitled, the dissent declared, to remove her case from the court to the public and the press.

Mr. Justice CLARK wrote a dissenting opinion which took the tack that no one denied that the petitioner said what she was charged with saying, and that to hold that the facts did not support the findings "some six and a half years later and some 5,000 miles away" was only second-guessing the duly constituted authorities who had decided otherwise.

The case was argued by John T. McTernan for petitioner and by A. William Barlow for the Bar Association of Hawaii.

Communications . . . *defamation*

Farmers Educational and Cooperative Union of America v. *WDAY, Inc.*, 360 U. S. 525, 3 L. ed. 2d 1407, 79 S. Ct. 1302, 27 U. S. Law Week 4521. (No. 248, decided June 29, 1959.) *On writ of certiorari to the Supreme Court of North Dakota. Affirmed.*

The issue here was whether a radio station, prohibited by the Federal Communications Act from censoring the content of political speeches broadcast over its facilities, could be sued for libel for statements so broadcast. The Court held that the station was immune from liability.

The case arose in 1956 when one of three legally qualified candidates for United States Senator from North Dakota delivered a television and radio address in which he accused his opponents and the petitioner of conspiring to "establish a Communist Farmers Union Soviet right here in North Dakota". The petitioner sued both the candidate and the station. The state district court dismissed the suit as to the station on the ground that Section

Reviews in this issue by Rowland Young.

315 of the Federal Communications Act, which makes it mandatory for stations to permit all candidates for office to use their facilities if they have permitted one to do so, grants immunity from suit for defamatory statements so broadcast. The supreme court of the state affirmed.

The United States Supreme Court affirmed, speaking through Mr. Justice BLACK. The Court rejected a suggestion that Section 315 of the Act, which prohibits censorship by the station, nevertheless leaves it free to delete libelous material from broadcast speeches. The policy of the statute was to encourage the broadcasting of political discussions, the Court said, and the station would face such an extremely difficult problem in attempting to censor libelous discussion that it might exclude all remarks even faintly objectionable or it might inhibit a legitimate presentation under the guise of excising libelous material. In either event, the result might well be to force candidates to avoid controversial issues during debates over radio and television, the Court remarked.

In upholding the station's immunity from suit for libel for a defamatory political broadcast, the Court pointed out that unless the statute grants such immunity, it permits civil and even criminal liability to be imposed for the very conduct that the statute requires of the station. The Court brushed aside the argument that the state conferred no immunity because Congress had expressly refused to adopt a provision explicitly conferring immunity. That refusal by Congress, said the Court, was offset by its refusal to adopt proposals that would have permitted stations to censor libelous statements.

Mr. Justice FRANKFURTER wrote a dissenting opinion in which Mr. Justice HARLAN, Mr. Justice WHITTAKER and Mr. Justice STEWART joined. The dissent argued that the Communications Act conferred no immunity upon stations and that Congress had left the question of liability for defamatory broadcasts to the states. The state courts might well find that the station was immune, the dissent said, and if unfairness to the station did result there might also be unfairness in depriving a defamed person of recovery.

The case was argued by Edward S. Greenbaum and Harriet F. Pilpel for petitioner, by Harold W. Bangert for respondent and by Douglas A. Anello for the National Association of Broadcasters as *amicus curiae*.

Constitutional law . . . *censorship*

Kingsley International Pictures Corporation v. *Regents of the University of the State of New York*, 360 U. S. 684, 3 L. ed. 2d 1512, 79 S. Ct. 1362, 27 U. S. Law Week 4492. (No. 394, decided June 29, 1959.) *On appeal from the Court of Appeals of New York. Reversed.*

This decision held that New York had stepped beyond permissible constitutional bounds in denying a license to the film version of D. H. Lawrence's *Lady Chatterley's Lover*. The decision was somewhat unusual since, although there were no dissents, all but three members of the Court filed opinions.

The state authorities denied the film a license on the ground that it was immoral. The Appellate Division reversed, but was reversed in turn by the New York Court of Appeals, which, while rejecting the notion that the film was obscene, found that it "alluringly portrays adultery as proper behavior". This was held to bring it under the state statute which requires denial of a license to motion pictures "which are immoral in that they portray 'acts of sexual immorality . . . as desirable, acceptable, or proper patterns of behavior' ".

The Supreme Court's opinion was delivered by Mr. Justice STEWART. The Court took the view that the state had prevented the exhibition of the film because it advocates an idea—that adultery under certain circumstances may be proper behavior. This ran afoul of the First Amendment's "basic guarantee . . . of freedom to advocate ideas", the Court declared.

Mr. Justice BLACK wrote a concurring opinion which took issue with Mr. Justice FRANKFURTER's plea for a "case-by-case" determination of constitutionality. ". . . my belief is", Mr. Justice BLACK said, "that this Court is about the most inappropriate Supreme Board of Censors that could be found". This approach, he added, would make it impossible for the states or motion picture makers to know in advance, with any fair certainty, what can or cannot be done.

Mr. Justice FRANKFURTER wrote an opinion concurring in the result. This opinion argued that freedom of expression of ideas was not absolute, any more than any other freedom. The problem, said Mr. Justice FRANKFURTER, "is the formulation of constitutionally allowable safeguards which society may take against evil without impinging upon the necessary dependence of a free society upon the fullest scope of free expression". He decried the action of the Court in striking down the New York statute "in order to escape the task of deciding whether a particular picture is entitled to the protection of expression under the Fourteenth Amendment . . . We cannot escape such instance-by-instance, case-by-case application of that clause in all the variety of situations that come before this Court."

Mr. Justice DOUGLAS, joined by Mr. Justice BLACK, wrote a concurring opinion which argued that all prior censorship of movies is unconstitutional. "If a particular movie violates a valid law, the exhibitor can be prosecuted in the usual way", the opinion declared.

Mr. Justice CLARK's opinion concurring in the result, argued that the censorship here was improper because the standard applied by the New York courts left too wide a range for the censor's discretion. "The only limit . . . is his understanding of what is included within the term 'desirable, acceptable or proper' ", the opinion held. "This is nothing less than a roving commission in which individual impressions become the yardstick of action, and results in regulation in accordance with the beliefs of the individual censor rather than regulation by law."

Mr. Justice HARLAN wrote an opinion concurring in the result in which Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER joined. This opinion took the position that the New York statute

was constitutional but that its application to this particular film was improper. The opinion saw in the film only "a somewhat unusual, and rather pathetic, 'love triangle,' lacking in anything that could properly be termed obscene or corruptive of the public morals by inciting the commission of adultery."

The case was argued by Ephraim London for appellant and by Charles A. Brind, Jr., for appellees.

Criminal law . . .

conspiracy to evade income taxes

Ingram v. *United States*, 360 U. S. 672, 3 L. ed. 2d 1503, 79 S. Ct. 1314, 27 U. S. Law Week 4439. (No. 457, decided June 29, 1959.) *On writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Affirmed in part and reversed in part.*

The four petitioners were among twenty-six indicted and tried for conspiracy to evade and defeat the payment of federal taxes imposed on lottery operations. Ten were convicted. The trial established the existence of a large-scale operation of the numbers game in Atlanta, Georgia, from 1954 to 1957 in violation of Georgia law, and there was evidence to show that the petitioners had made every effort to conceal these operations. While none of the petitioners paid the federal taxes in question, there was no direct evidence to show that the petitioners knew of the taxes. Petitioner Ingram was a banker for the lottery, petitioner Jenkins one of the owners of the enterprise; the other two petitioners, Smith and Law, were minor clerical functionaries at the headquarters of the operation. The convictions in the District Court were affirmed by the Court of Appeals.

Speaking for the Supreme Court, Mr. Justice STEWART affirmed the convictions of the entrepreneurs, Ingram and Jenkins, but reversed as to Smith and Law. The record was clear as to Jenkins and Ingram, the Court said. They were entrepreneurs in the gambling business and clearly liable for the special taxes and registration requirements that the Federal Government has imposed on that kind of business. "... the evidence of the agreement between Ingram and Jenkins to operate this gambling enterprise, which operation made them liable for federal taxes, and to conceal its operation and its income is clear on this record ...", the Court said. The evidence was sufficient to support a conclusion that they were engaged not only in a conspiracy to operate and conceal their gambling enterprise, but that they were also parties to an agreement to attempt to defeat or evade the federal taxes..."

The Court said that the case was much different as to Smith and Law, who, while they were clearly participants in a conspiracy to operate a lottery, were not shown to have had knowledge that Ingram and Jenkins had not paid the taxes. They were not liable for the taxes themselves. An essential element of proof of conspiracy to evade taxes, the Court said, is knowledge on the part of Smith and Law that Ingram and Jenkins were liable for federal taxes by reason of the gambling operations, and the Government had not proved such knowledge. The fact that Smith and Law had an intimate connection with the lottery and cooperated to keep it secret was not enough to support an inference that they knew that their superiors owed federal wagering taxes, the Court explained.

Mr. Justice BLACK took no part in the consideration or decision of the case.

Mr. Justice HARLAN, joined by Mr. Justice DOUGLAS and Mr. Justice BRENNAN, wrote an opinion concurring in part and dissenting in part. This opinion argued that the same reasoning by which the Court exonerated Smith and Law from the charge of conspiring to evade taxes applied with equal force to Jenkins and Ingram.

The case was argued by Wesley R. Asinof for petitioners and by J. Dwight Evans, Jr., for the United States.

Defamation . . .

public official's privilege

Barr v. *Matteo*, 360 U. S. 564, 3 L. ed. 2d 1434, 79 S. Ct. 1335, 27 U. S. Law Week 4506. (No. 350, decided June 29, 1959.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed.*

The question here was whether an absolute privilege in defamation actions should be extended to executive officials of minor policy-making rank.

This was a suit for libel filed by former employees of the Office of Rent Stabilization against the Acting Director of that agency. The respondents claimed damages for statements made in a press release issued by the Acting Director. The release announced the suspension of the respondents and began as follows: "William G. Barr, Acting Director of Rent Stabilization, today served notice of suspension on the two officials of the agency who in June 1950 were responsible for the plan which allowed 53 of the agency's 2,681 employees to take their accumulated annual leave in cash." The plan, which had been opposed by petitioner while he was General Manager of the agency, was intended to obviate the possibility that the agency might have to make large terminal-leave payments out of general agency funds if its life were extended by the Congress. The matter came to the attention of Congressmen, some of whom attacked it from the floor of Congress. The press release was intended to explain Barr's original opposition to the plan. The Court of Appeals affirmed the judgment of the District Court in favor of the respondents.

Before the Supreme Court, the petitioner contended that the press release was absolutely privileged.

Mr. Justice HARLAN announced the judgment of the Court and delivered an opinion in which Mr. Justice FRANKFURTER, Mr. Justice CLARK and Mr. Justice WHITTAKER joined. The opinion favored sustaining the absolute privilege on the ground that government officials must be free to exercise their duties unembarrassed by the fear of damage suits for actions taken in the course of those duties. The opinion admitted that the question was a close one, but it concluded that the issuance of the press release here was an appropriate exercise of the petitioner's discretion as Acting Director of the Agency.

Mr. Justice BLACK wrote a concurring opinion which took the tack that the press release was privileged because it was "neither unauthorized nor plainly beyond the scope of Mr. Barr's

official business, but instead related more or less to general matters committed by law to his control and supervision".

The CHIEF JUSTICE wrote a dissenting opinion in which Mr. Justice DOUGLAS concurred. The dissent argued that the grant of an absolute privilege in this case might seriously affect honest, open criticism of the Government and Government officials. "... it will take a brave person to criticize government officials knowing that in reply they may libel him with immunity in the name of defending the agency and their own position", the dissent declared.

Mr. Justice STEWART wrote a dissenting opinion which argued that issuance of the press release was not in petitioner's line of duty. He was seeking only to defend his own reputation, the opinion said, and so the privilege should not apply.

Mr. Justice BRENNAN dissented.

The case was argued by Daniel M. Freedman for petitioner and by Byron N. Scott for respondents.

Howard v. *Lyons*, 360 U. S. 593, 3 L. ed. 2d 1454, 79 S. Ct. 1331, 27 U. S. Law Week 4513. (No. 57, decided June 29, 1959.) *On writ of certiorari to the United States Court of Appeals for the First Circuit. Reversed.*

This was a companion case to No. 350. The petitioner, a captain in the Navy, was Commander of the Boston Naval Shipyard. The respondents were officers of the Federal Employees Veterans Association, a group of civilian employees at the shipyard, recognized as an employees' representative group by the shipyard.

The petitioner became dissatisfied with the kind of criticism contained in a bulletin issued by the Association and announced that he was withdrawing recognition of it. He issued a statement about the matter to the Chief of the Bureau of Ships and the Chief of Naval Industrial Relations; this statement was also sent to members of the Massachusetts delegation in Congress.

The respondents brought this suit for libel, contending that the statement had defamed them. The defense was that the statement was absolutely privileged. The District Court granted summary judgment for the petitioner, but the Court of Appeals ordered a new trial on the theory that the issuance of the statement to the Congressmen was at best subject to a qualified privilege.

Speaking for the Supreme Court, Mr. Justice HARLAN reversed. The decision in No. 350 governed this case, the Court said. Both the petitioner and his commanding officer had submitted uncontradicted affidavits to the effect that the sending of copies of the statement was part of the petitioner's official duties. The Court rejected an argument that state law was to be applied. The privilege must be judged by federal standards, to be formulated by the federal courts in the absence of legislation by Congress, the Court declared.

Mr. Justice BLACK announced that he concurred for the reasons stated in his concurring opinion in No. 350.

The CHIEF JUSTICE, joined by Mr. Justice DOUGLAS, dissented. The dissent argued that there was no reason to give the petitioner an absolute privilege here since he was under no mandatory duty to send the statement to the members of Congress.

Mr. Justice BRENNAN wrote a dissenting opinion in this and in No. 350 which argued that only a qualified privilege should have been granted to the petitioner.

The case was argued by Paul A. Sweeney and reargued by Daniel M. Freedman for petitioner and argued and reargued by Claude L. Dawson for respondents.

Labor law . . .

Railway Labor Act

Pennsylvania Railroad v. *Day*, 360 U. S. 548, 3 L. ed. 2d 1422, 79 S. Ct. 1322, 27 U. S. Law Week 4517. (No. 397, decided June 29, 1959.) *On writ of certiorari to the United States Court of Appeals for the Third Circuit. Reversed and remanded.*

The issue here was whether a retired railroad employee could sue his former employer for additional compensation in the District Court or whether his exclusive remedy lay with the National Railroad Adjustment Board.

The claimant was a locomotive engineer. Under the terms of the collective bargaining agreement between the railroad and the Brotherhood of Locomotive Engineers, engineers were entitled to extra compensation when they were used beyond their switching limits under certain conditions. The suit was brought for one day's pay for each of the 1,000-1,500 times the claimant had been assigned to leave his switching limits and perform service for his employer on tracks belonging to another railroad. The claim had been rejected by the road just before the claimant retired. The District Court had dismissed the complaint on the ground that the Board's jurisdiction was exclusive, but the Court of Appeals reversed on the theory that the claimant was no longer an "employee" of the railroad and therefore that the Board's decision was not binding upon him.

Mr. Justice FRANKFURTER spoke for the Supreme Court, reversing and remanding. The Court reasoned that the National Railroad Adjustment Board had been established to settle disputes arising out of the relationship of a carrier and its employees. "All the considerations which led Congress to entrust an expert administrative board with the interpretation of collective bargaining agreements are equally applicable when, as here, the employee has retired from service after initiating a claim for compensation for work performed while on active duty". The nature of the problem and the need for expert knowledge and experience remain the same, the Court pointed out, and the same collective bargaining agreement must be interpreted. A contrary conclusion, the Court added, would create a class of "preferred claimants".

Mr. Justice BLACK, joined by the CHIEF JUSTICE and Mr. Justice DOUGLAS, wrote a dissenting opinion. The dissent argued that the Court was finding reasons outside the language of a carefully drafted statute "for expanding the Board's jurisdiction beyond the boundaries set by the definitions of Congress. These reasons, in my judgment, do not support the expansion of the Act's coverage which the Court makes..." The dissent also argued that the effect of the decision was to

deprive the claimant of his constitutional right to a jury trial.

The case was argued by Richard N. Clattenburg for petitioner and by James M. Davis, Jr., for respondent.

Labor law . . .

Railway Labor Act

Union Pacific Railroad v. *Price*, 360 U. S. 601, 3 L. ed. 2d 1460, 79 S. Ct. 1351, 27 U. S. Law Week 4499. (No. 414, decided June 29, 1959.) *On writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Reversed and remanded.*

The question here was whether a trainman could sue in a federal court for damages for his allegedly wrongful dismissal after he had been unsuccessful before the National Railroad Adjustment Board. The Railway Labor Act makes awards of the Adjustment Board "final and binding upon both parties to the dispute, except insofar as they shall contain a money award".

The dispute arose in 1949 when the respondent was a swing brakeman for the petitioner. He was ordered to deadhead from Las Vegas, Nevada, to Nipton, California, where he was to be assigned to a train that was proceeding to Las Vegas. The respondent arrived in Nipton at about 10:30 P.M.; the train to which he was to be assigned was due in at about 4:00 A.M. There were no eating or sleeping facilities in Nipton and respondent returned to Las Vegas, telling the dispatcher that he would return after getting something to eat, disobeying the dispatcher's instructions to remain in Nipton. After an investigation, the railroad discharged him, and the Brotherhood of Railroad Trainmen submitted the case to the Board, which rendered the award, "Claim denied".

In 1955, the respondent brought this suit in the District Court for damages for wrongful dismissal. The District Court granted summary judgment for the railroad. The Court of Appeals reversed, its theory being that, while the District Court would have been without jurisdiction if the Board's decision was on the merits, the Board had based its award only on a finding that the manner in which the investigation of respondent's dismissal was conducted had not abridged any of his rights.

Speaking for the Supreme Court, Mr. Justice BRENNAN reversed and remanded the case to the Court of Appeals with instructions to reinstate the judgment of the District Court. The Court examined the legislative history of the Railway Labor Act and concluded from that and the explicit language of the statute that an award by the Adjustment Board was intended to be conclusive. The Court rejected respondent's argument that the denial by the Board of reinstatement and back pay was a "money award"—a "money award", it said, is an award directing the payment of money, and it would "distort the English language to interpret that term as including a refusal to award a money payment".

Mr. Justice DOUGLAS, joined by the CHIEF JUSTICE and Mr. Justice BLACK, wrote a dissenting opinion. The dissent argued that an award of no damages was just as much a "money award" as an award of 6 cents, and therefore that the case came under the statutory exception to the finality clause.

The case was argued by James A. Wilcox for petitioner and by Samuel S. Lionel for respondent.

National Security . . .

clearances

Greene v. *McElroy*, 360 U. S. 474, 3 L. ed. 2d 1377, 79 S. Ct. 1400, 27 U. S. Law Week 4528. (No. 180, decided June 29, 1959.) *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Reversed and remanded.*

This case held invalid the dismissal for security reasons of an aeronautical engineer employed by a company producing defense goods for the Armed Forces.

The petitioner was vice president and general manager of the Engineering and Research Corporation (ERCO) engaged in the developing and manufacturing of mechanical and electronic products for the Navy. He was dismissed in 1953 after revocation of his top-secret clearance by the Secretary of the Navy. The dismissal followed a series of hearings before the Personnel Security Board, the Industrial Employment Review Board and their successor agencies.

The petitioner was informed of the general nature of the charges against him, but he was denied access to the confidential reports on which the charges against him had been filed, and he had no opportunity to confront and question the persons who made the statements that reflected upon his loyalty.

The Government called no witnesses. The charges dealt largely with the petitioner's life with his former wife and the presence in their home of Communist publications and their association with Communists, including members of the Russian Embassy. The petitioner contended that these were his wife's friends, with whom he had little in common, and that his basic disagreement with his wife's views was the prime cause of the failure of their marriage. Petitioner's witnesses, executives of ERCO and military officers with whom he had worked, all testified to his loyalty and discretion. Following his dismissal, petitioner was unable to find another job in the electronics field because he had no clearance and he was forced to take a job as an architectural draftsman for $4,700 per year. At ERCO, he had earned $18,000 a year.

The District Court denied any relief and the Court of Appeals affirmed.

The Supreme Court reversed, speaking through the CHIEF JUSTICE. The Court rested its decision on the ground that neither Congress nor the President had authorized a security program that provided for denying security clearance to persons on the basis of confidential reports against them which allowed them no opportunity to confront the informants and cross examine them. The Executive Order and the statutes on which the respondents relied were read by the Court as authorizing "an industrial clearance program which affords affected persons the safeguards of confrontation and cross-examination" the Court said, but absent explicit language, it could not be assumed that either the President or Congress intended to permit administrative action that would raise "serious constitutional

problems". With this view of the case, no decision was necessary upon the constitutional questions that were raised.

Mr. Justice FRANKFURTER, Mr. Justice HARLAN and Mr. Justice WHITTAKER noted their concurrence in the judgment "on the ground that it has not been shown that either Congress or the President authorized the procedures . . . intimating no views as to the validity of those procedures".

Mr. Justice HARLAN wrote an opinion concurring specially. In his view, the Court should not have discussed the constitutional issues at all "until the use of such procedures in matters of this kind has been deliberately considered and expressly authorized by the Congress or the President".

Mr. Justice CLARK wrote a dissenting opinion which argued that the issue was both "clear and simple"—the petitioner had no constitutional right to access to the Government's military secrets. In his view, the security procedures used here were fully authorized by the President and Congress. ("How the Court can say that the President did not authorize it", the dissent remarked, "is beyond me, unless the Court means that it is necessary for the President to write out the Industrial Security Manual in his own hand."). The opinion also argued that the procedures of the security boards were constitutional.

The case was argued by Carl W. Beruefly for petitioner and by Assistant Attorney General Doub for respondents.

National Security . . . *clearance*

Taylor v. *McElroy*, 360 U. S. 709, 3 L. ed. 2d 1528, 79 S. Ct. 1428, 27 U. S. Law Week 4558. (No. 504, decided June 29, 1959. *On writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Remanded with instructions.*

Like the *Greene* case, the issue here was a denial of security clearance to an industrial worker in a defense plant. The petitioner this time was a lathe operator and tool and die maker in an aircraft factory.

Before 1956, the petitioner had had a "confidential" clearance; in that year he was denied "secret" clearance and his "confidential" clearance was suspended. After hearings similar to those in the *Greene* case, he was discharged from his employment. He filed this suit for a declaration that he was entitled to a hearing at which he could confront the informants whose statements had been used against him, and that the denial of clearance violated his Fifth Amendment rights. He also sought an injunction. The District Court denied relief; certiorari was granted before the Court of Appeals had heard argument.

Speaking *per curiam*, the Supreme Court noted that in 1958 the Secretary of Defense notified all interested parties that the petitioner had been granted "secret" clearance, due to new regulations. The Solicitor General, in oral argument, made representations which placed the petitioner in precisely the same position as all others who had been granted clearance. The Court accordingly remanded the case to the District Court with instructions to dismiss it as moot. The Court noted that the petitioner was eligible for compensation for wages lost while he was unemployed.

The case was argued by Joseph L. Rauh, Jr., for petitioner and by Solicitor General Rankin for respondents.

Federal Tax Liens: Proposed Revision of the Law

The proposed comprehensive revision of federal law relating to tax liens, priorities and procedures, which was approved by the House of Delegates on February 23, 1959, and which was described in the JOURNAL for April, 1959, under the above title, has now been introduced in Congress, in three identical bills, H.R. 7914, H.R. 7915, and S. 2305.

What's New in the Law

The current product of courts, departments and agencies

George Rossman · EDITOR-IN-CHARGE

Richard B. Allen · ASSISTANT

Criminal Law . . . *coerced confessions*

The Court of Appeals for the Second Circuit has granted a writ of habeas corpus to a New York State prisoner on the ground that his state court conviction was unconstitutionally obtained through the use of coerced statements and admissions.

The prisoner was convicted under the New York felony-murder statute for committing a homicide in the course of committing a felony. He received a life sentence. He was arrested about 8:15 P.M. and questioned by police from then, except for possibly about three or four hours, until 7:15 A.M., when he was booked. Both before and after being booked he gave stenographic statements which were used subsequently in his trial. He was not arraigned until 1:30 P.M.—seventeen hours after his arrest. During this elapse of time an attorney had called at the police station to see him and had been denied entrance. Also during that time the police had questioned the prisoner's crime-companion, who was physically mistreated by the police.

The petitioner in the instant case also claimed he had been beaten by the police, but the Court found him entitled to the writ without considering that. It declared that the three factors of the length of his detention before arraignment, exclusion of his counsel, and his knowledge of the brutal treatment of his companion combined to render the statements and admissions involuntary. The fact that they were placed before the jury violated the prisoner's rights, the Court concluded.

(*U. S. ex rel. Corbo* v. *LaVallee*, United States Court of Appeals, Second Circuit, September 29, 1959, Lumbard, J.)

Criminal Law . . . *loitering in schools*

A statute enacted in 1954 by New York to help curb trouble in schools has been upheld by the state's highest court—the Court of Appeals. The act makes loitering in and about school buildings without written permission disorderly conduct.

The defendant, who was not a pupil in the school and who did not have the required permission, entered the Baldwin Senior High School one afternoon to meet a couple of friends. Shortly afterward he left with his companions and when outside he put an unlighted cigarette in his mouth. A teacher told him three times to take it out, but without success. The defendant struck the teacher. There was evidence that the defendant had been warned before by a teacher to stay away from the school.

The conviction was challenged on the ground that the statute was unconstitutional because it lacked standards and an appropriate definition. But the Court did not agree. It conceded that it had struck down a loitering statute relating to a street, but it declared that a public street is a far different thing from a school building. "A school is in a sense public in that it is endowed and operated by the taxpayers' money", it said, "but it is not public in the sense that any member of the public may use it for his own personal purposes, and is justifiably the proper subject for proscribed acts such as loitering."

The Court also rejected the defendant's contention that the statute was not intended to make criminal an otherwise innocent activity. It said that "loitering" was a term which had acquired a common and accepted meaning, and it declared that the nature of activity in a school building supported a restriction such as contained in the statute.

Two judges concurred in separate opinions and one dissented. The dissenter thought the word "loiter" was too loose for the purpose apparently intended by the statute. As construed by the majority, the act "runs afoul of the requirements of constitutional due process", he wrote.

(*New York* v. *Johnson*, Court of Appeals of New York, July 8, 1959, Dye, J., 6 N. Y. 2d 549, 161 N.E. 2d 2.)

Grand Juries . . . *questionnaires*

The New York Court of Appeals, with three judges dissenting, has ruled that a grand jury has authority to compel a witness before it to fill out and swear to the truthfulness of a questionnaire relating to his personal finances.

The case arose when an inspector in the New York City Department of Buildings, who had been subpoenaed as a witness by a grand jury investigating alleged bribery and extortion among some public employees, refused to complete the questionnaire. He was convicted of criminal contempt, from the confinement for which he sought habeas corpus.

The petitioner had signed an im-

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West Publishing Company or in The United States Law Week.

munity waiver and had been a willing witness before the grand jury. At the conclusion of his testimony he was asked to take the questionnaire with him, fill it out, return in a week, swear to the truth of the answers and submit himself to any further questioning. As the Court described them, the inquiries in the questionnaire were "simple ones asking for details of the income of relator and members of his household, the names of banks in which he and his family have accounts, the existence of safe-deposit boxes, life insurance and other policies, stock brokerage accounts and of his charge accounts".

The reluctant inspector contended that the questionnaire procedure was not authorized by New York law. He argued that the grand jury was empowered to receive only oral or deposition testimony and records or documents actually in existence.

Affirming the conviction, the majority of the Court could see no difference between using the questionnaire procedure and eliciting the desired information through oral testimony. They pointed out that the witness probably could not have answered the questions from memory, and he would have been directed to assemble the information and come back to testify. "The same thing is being done here", it said, "except that he is directed to write out the information on a prescribed form."

Answering another argument, the Court conceded that there might be instances of oppressive use of questionnaires, but said it would deal with them when they arise. It explained that the contention could not apply to this case because the questionnaire was not complex and could be completed by the witness without any professional or other assistance.

One judge concurred in a separate opinion and three dissented. The latter hung their decision on a New York statute which provides, in part, that a grand jury may "receive no other evidence" than that "given by witnesses produced and sworn before them". They placed their reliance on the word "and". It meant that the witness couldn't be asked to come in with testimony produced outside the grand jury room, they wrote. The statute's reference to "legal documentary evidence", they argued, related only to documents already in existence.

(*New York ex rel. Sillifant* v. *Sheriff of City of New York*, Court of Appeals of New York, July 8, 1959, Desmond, J., 6 N. Y. 2d 487, 160 N.E. 2d 890, 190 N.Y.S. 2d 641.)

Judges . . .
immunity to discipline

The Court of Appeals of Kentucky has adopted a rule that a judge is immune to the regular processes of professional discipline if the act of misconduct is not one that is capable of being committed by any lawyer. Applying this principle, the Court has dismissed a disciplinary action against a county judge for his wrongful barring of certain lawyers from practice in the court in which he presided.

The Court remarked that the judge's conduct apparently resulted from "animosity created by previous unpleasant relationships" with the banned lawyers. In Kentucky, county judges may practice law while in office, and the respondent in the instant case was also a practitioner.

Declaring that the professional disciplinary processes should not be misused to "become an avenue to personal, religious or political reprisal", the Court postulated this rule: "No act of misconduct shall be the subject of disciplinary action unless such act is at the same time capable of commission by any member of the bar without being specifically set apart from other members." For example, the Court explained, if a lawyer who is a public officer steals public funds he will be subject to professional discipline not because of his "official defalcation" but because any lawyer can steal, whether he is a public officer or not. Getting closer to the instant case, the Court said that the lawyer-public officer could also be guilty of "official tyranny" but not be subject to professional discipline because the offense of "tyranny" can be committed only by a lawyer set apart as an officer.

The bar commissioners of the Kentucky State Bar Association had recommended a two-year suspension for the judge, but, in view of its rule, the Court dismissed the proceeding and remarked that while it did not condone the respondent's acts, disciplinary action "must originate elsewhere". The Court also suggested that the aggrieved parties had other remedies.

In result the case disagrees with the Supreme Court of Ohio in *Mahoning County Bar Association* v. *Franko*, 168 Ohio St. 17, 151 N.E. 2d 17 (44 A.B.A.J. 977; October, 1958), where in a voluntary-Bar state (Kentucky is integrated) a judge was disciplined for failing to resign from his judicial office while running for a non-judicial one, and for improperly using the prestige of his judicial office in his campaign. And the Ohio Court later held that since the judge was suspended and no longer eligible for judicial office under Ohio law, he was subject to removal by *quo warranto*. *Ohio ex rel. Saxbe* v. *Franko*, 168 Ohio St. 338, 154 N.E. 2d 751 (45 A.B.A.J. 178; February, 1959). The Supreme Court of Colorado, however, stating a broader rule than that of the instant case, has held that a judge is immune to professional discipline and subject only to impeachment. *Petition of Colorado Bar Association*, 137 Colo. 357, 325 P. 2d 932.

(*In re Wehrman*, Court of Appeals of Kentucky, September 25, 1959, Bird, J., 327 S.W. 2d 743.)

Labor Law . . .
railroad jobs

Under the Railway Labor Act a railroad may eliminate positions considered by management to be unnecessary without prior consultation with the union and the positions may remain vacant while the dispute over them is being determined by the National Railway Adjustment Board. This is the decision of the Court of Appeals for the Second Circuit.

The Court arrived at this conclusion by designating a dispute over elimination of alleged "feather-bed" positions as a "minor dispute" under the Railway Labor Act, rather than a "major dispute". The practical effect of this determination was to place the initial decision in the field of management prerogative. Thus, the Court reasoned, no dispute arose until the employer eliminated the positions; then the

union's protest made the dispute. A further practical effect was that the elimination of the positions remains in force while the Adjustment Board determines whether the jobs can be cut out under the collective bargaining agreement.

In view of this determination the Court reversed an injunction requiring the railroads to rehire the employees whose jobs had been eliminated, but continued in force another injunction restraining the union from engaging in a protest strike or work stoppage while the dispute is before the Adjustment Board. The district judge had granted both injunctions in order to preserve the *status quo ante*.

One judge dissented on the ground that the lower court's action had been correct under the circumstances. He thought the "minor dispute-major dispute" compartments were particularly inapt when applied to the present case. He said that the "precipitous" action of the railroads in eliminating jobs without any prior negotiations with the union violated duties imposed by the Railway Labor Act. He contended, moreover, that the double injunctions were the only practical way of preventing a work stoppage that might result from non-enjoinable individual picketing by the displaced workers.

(*Baltimore & Ohio Railroad Company* v. *United Railroad Workers Division of Transport Workers Union*, United States Court of Appeals, Second Circuit, October 2, 1959, Swan, J.)

Labor Law . . .
Taft-Hartley injunction

In the first full-blown constitutional attack on the eighty-day injunction provisions added to the National Labor Relations Act in 1946 by the Taft-Hartley Act (29 U.S.C.A. §§176-180), the Court of Appeals for the Third Circuit has upheld the constitutionality of the sections and has agreed with the trial judge that the Government made an adequate showing for the issuance of an injunction.

The ruling came on a review by the Court of an injunction order of the United States District Court for the Western District of Pennsylvania issued in October enjoining continuation of the nation-wide steel strike. The statute permits district courts to enjoin strikes which imperil the national health and safety. The injunction, which is sought on application of the United States, must be dissolved within eighty days of issuance.

The union involved in the instant case, the United Steelworkers of America, contended that the United States' application did not constitute a "case or controversy" within the meaning of those terms as used in the Constitution to limit the jurisdiction of so-called federal "constitutional" courts, and that therefore the district court had no jurisdiction to entertain the application. The Court looked at the legislative history of the statute and its purpose. It turned down the union's argument and agreed with the Court of Appeals for the Second Circuit which, in *U. S.* v. *United Steelworkers of America*, 202 F. 2d 132, held that determining whether a strike "is an invasion of the rights of the public presents the usual kind of case or controversy which is justiciable by a court".

The Court pointed out that the statute requires a decision "whether the evidence adduced in a case shows serious interference with essential national defense activities or threatened impairment of public health". This requirement, it said, was "specific and factual enough to bring the inquiry within the area of judicial decision as distinguished from legislative judgment".

The union also contended that the proof of the Government failed to measure up to the standard required by the Act. By stipulation of the parties the proof consisted entirely of affidavits. The Court emphasized that the Act contemplated not only a present emergency, but also one resulting if continuation of the strike "will" imperil the national health and safety in the future. The Court ruled that the proof of the United States showed a national emergency of the character contemplated by the statute, and it rejected an argument by the union that its offer to open one or two plants for national-defense production cut the ground from under the Government's position. "The steel industry is too vast and too complicated to be segmented so as to make such a desirable result practicable", it said.

Finally the Court turned down the union's contention that the injunction was too sweeping a remedy for the situation. In putting forward this position the union said that, even assuming that the findings of national emergency were correct, the District Court did not have to issue an injunction, and that, in fact, provisions of the Defense Production Act and the Universal Military Training and Service Act could have been employed for a better solution.

The Court conceded that the district judge could have determined in the exercise of his discretion that the injunction authorized by the act would be ineffectual, rather than effective, in ending the strike. But, it continued, he did not abuse his discretion in deciding otherwise. "Whether the remedy provided by the Labor-Management Relations Act is sufficient to accomplish a cessation of labor strife is a question not for this Court but for Congress", it remarked.

Additionally the Court found a positive reason favoring the injunction. It pointed out that the statute provides during the course of the injunction for the implementation of machinery designed to settle the dispute. One of these is a secret ballot of the employees on the employer's last offer. It would be a shame, the Court thought, not to take advantage of this machinery.

One judge dissented. He agreed that the injunction sections are constitutional and that the Government showed the existence of a national emergency, but he disagreed with the issuance of the injunction. He said the injunction provisions evidenced a congressional intention to facilitate settlement of serious strikes, and not simply to send strikers back to work. Therefore, he reasoned, the United States was under a burden to show that the injunction would help in settlement of the basic labor dispute causing the strike. The Government failed to do this, he said, adding: "The evidence here shows that an injunction would not facilitate and might even make more difficult a negotiated settlement of this strike." He added his thought that the machinery provided for during the injunction could be used even without the issuance of an injunction.

[EDITOR'S NOTE: On November 7,

1959, the Supreme Court of the United States in a *per curiam* opinion affirmed the lower courts' decisions by an eight-to-one ruling and ordered the mandate to issue immediately. Justices Frankfurter and Harlan noted an intention to file an amplification of their views later and Justice Douglas dissented.

The majority of the Court rejected all three contentions raised by the Union. Answering the position taken by the Third Circuit's dissenter, that the District Court was not obliged to issue an injunction (even though finding the existence of a national emergency) unless convinced that it would facilitate settlement of the labor dispute, the Supreme Court said: "We do not believe that Congress in passing the statute intended that the issuance of injunctions should depend upon judicial inquiries of this nature. Congress was not concerned with the merits of the parties' positions or the conduct of their negotiations. Its basic purpose seems to have been to see that vital production should be resumed or continued for a time while further efforts were made to settle the dispute."

Justice Douglas's dissent was based on a strict interpretation of the statute —an interpretation he thought necessary to save the federal judiciary from an over-indulgence in labor-dispute injunctions. He took the position that the Government had failed to prove the "national health and safety" had been or would be imperiled.]

(*U. S.* v. *United Steelworkers of America*, United States Court of Appeals, Third Circuit, October 27, 1959, Biggs, J., rehearing en banc denied same day by equally divided Court, Judge Kalodner having disqualified himself from voting on rehearing en banc.)

Segregation . . . *pupil placement*

The Arkansas Pupil Placement Act, identical to the Alabama School Placement Law, has been held constitutional on its face by the Court of Appeals for the Eighth Circuit and three Negro school children have been told they must comply with the administrative provisions of the Act before they may press their claim that they are unconstitutionally segregated in the Dollarway, Arkansas, school because of their race.

The Alabama School Placement Law has become a popular prototype in Southern states because it has received the tentative imprimatur of the United States Supreme Court. The Alabama act was challenged in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, but was found by the United States District Court for the Northern District of Alabama not to be unconstitutional on its face, although admittedly subject to unconstitutional application. The Supreme Court affirmed the judgment "upon the limited grounds on which the District Court rested its decision". 358 U. S. 101. The acts provide a long list of factors that may be considered by local boards of education in assigning and transfering pupils; the list is entirely silent on race or color. Provisions for the filing of written objections to a particular assignment and for elaborate administrative hearings are also included.

In the instant case the United States District Court for the Eastern District of Arkansas had declared the placement statute constitutional on its face, but had ordered the school board to admit the three Negro children on the ground that they had "as a practical matter" exhausted their administrative remedies under the Act. This conclusion was based on findings that the school district had not done anything about accomplishing desegregation and had paid no attention to numerous oral requests of the Negroes for assignment to white schools under the 1959 act and its 1956 predecessor. Thus, the District Court held, it would be futile to make the plaintiffs go through the administrative processes established by the act.

(*Dove* v. *Parham*, United States District Court, Eastern District of Arkansas, July 31, 1959, Beck, J., 176 F. Supp. 242.)

On appeal, the Eighth Circuit agreed with the constitutional holding, but reversed the order by which the District Judge had directed admission of the Negroes for the 1959-1960 term. The Court concluded that the children had not complied with the placement law by making written objections as required. It said, however, that it had been assured on oral argument that the children would have a chance to have their applications acted on under the Act in time for the 1959-1960 term. The Court also continued an injunction issued to prevent the district from "continuing to maintain the system of unconstitutional segregation which had previously existed".

The Court declared that the plaintiffs "are without any general public-school right under Arkansas law to seek admission to a particular school, except on the basis of and in accordance with the provisions of the [placement] Act". Turning to the exhaustion-of-administrative-remedies phase of the case, the Court conceded that the past history of the school district might support the lower court's conclusion that it would be futile, but it thought that it could not say that it was "legally certain that [the statute] was going to be used as a subterfuge for effecting an unconstitutional result." That basis, the Court said, would be the only one on which to ground a circumvention of the administrative provisions of the statute.

(*Parham* v. *Dove*, United States Court of Appeals, Eighth Circuit, October 8, 1959, Johnsen, J.)

What's Happened Since . . .

On October 12, 1959, the Supreme Court of the United States:

■ DENIED CERTIORARI in *Richman Brothers Company* v. *Amalgamated Clothing Workers of America*, 168 Ohio St. 560 (45 A.B.A.J. 506; May, 1959), leaving in effect the decision of the Supreme Court of Ohio that federal pre-emption in the field of labor relations law precludes a state from granting an injunction to stop organizational picketing.

■ DENIED CERTIORARI in *Arkansas Bar Association* v. *Block*, 323 S.W. 2d 912 (45 A.B.A.J. 854; August, 1954), leaving in effect the decision of the Supreme Court of Arkansas that the preparation by real estate brokers of documents in connection with real estate transactions and financing, except offers and acceptances, constitutes the practice of law and may be enjoined.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

The importance of the planned colloquy in building a record to support an interpretation of a statute is not generally recognized. The following discussion by Mr. Moorhead, a lawyer as well as a member of Congress, calls attention to a number of instances in which the colloquy has influenced the courts in determining legislative intention.

A Congressman Looks at the Planned Colloquy and Its Effect in the Interpretation of Statutes

By William S. Moorhead, Member of Congress, Pittsburgh, Pennsylvania

Because of the complexity of modern federal legislation, courts, in construing legislative intent, have resorted to legislative history including the record of debates on the floor of Congress.

Mindful of this judicial scrutiny, legislators of today have used the opportunity of debate to achieve legislative goals which might otherwise be unattainable. Indeed, by the use of the "friendly colloquy", two men may be able to legislate more effectively than all of Congress.

This type of colloquy is presented in the form of a friendly exchange of questions and answers about the pending legislation between members, one of whom is usually a member of the committee from which the legislation emanated. This seeming repartee is not accidental. In fact it is just the opposite. It has been carefully planned by the parties for the express purpose of providing a legislative interpretation of a statutory provision which might otherwise be differently interpreted.

The need for the type of explanation provided by such a colloquy may arise for various reasons. It may be used to overcome legal, parliamentary or political obstacles.

As every legislative draftsman knows, it is difficult, if not impossible, to avoid ambiguities and cover every contingency with legislative language. Sometimes such legal obstacles may be overcome by an explicit statement in the committee report, but often it is desirable to clarify the purpose and intent of the statute during debate. This is particularly true where an ambiguity is not discovered until after the committee report has been filed.

Parliamentary obstacles can be overcome by use of the planned colloquy. Rule XIX of the Rules of Procedure of the House of Representatives prohibits amendments in the third degree. A substitute bill is considered as an amendment. If, for example, after a substitute bill has been adopted, an amendment is proposed, this amendment is not subject to further amendment. If further clarification is necessary, resort must be had to colloquy.

For reasons of strategy, proponents of a particular bill may want to oppose all amendments. They may fear that if one amendment is adopted it will open the door to further amendments. In such a situation, however, the proponents might be willing to participate in a friendly colloquy.

In other situations proponents of a bill will stage a planned colloquy to give a construction to a bill which will, they hope, win over opponents of the legislation.

Perhaps the most interesting and controversial use of the colloquy to overcome political obstacles arises when it is engaged in for the purpose of establishing a meaning and intent to legislation which could not have been accomplished by direct language in the statute. Many if not most bills are controversial to some degree, and often it may be desirable when drafting a bill to couch provisions in innocuous language in order to minimize possible objections during committee consideration. Naturally, however, the proponents of a particular viewpoint would like to insure that their interpretation be the accepted one. The friendly colloquy on the floor during debate can serve well in this situation. Acquiescence by the committee chairman in a stated intent will very likely be relied upon by the courts in the absence of objection or other reliable evidence of an opposite intent.

The House debate on the recently passed Landrum-Griffin Bill contains an excellent example of the use of this device. When this bill came to the House floor originally it contained a provision which in effect outlawed the use of secondary boycotts in labor disputes. As the section was written, it would probably have been interpreted as extending the secondary boycott prohibition to economic pressure used against non-union employers in the ladies' garment industry which operate under a jobber-contractor system of production. Congressman Teller, of New York, was most anxious to prevent such an interpretation and toward this end entered into a colloquy with both Congressman Griffin and Congressman Landrum. In answer to questions, both gentlemen assured Mr. Teller that the bill would not have the feared effect.[1] In 1949 a similar colloquy on this same subject took place between Senator Ives and Senator Taft during consideration of the Taft-Hartley Act.[2] There is no doubt but that these explanations in both instances could be used as evidence of congressional intent.

In earlier cases the courts completely refused to consider legislative debates in determining congressional intent. Chief Justice Taney, in an 1845 opinion on the construction of the Compromise Tariff Act of 1833, *Aldridge* v. *Williams*, 44 U. S. (3 How.) 9, 24 (1845) said:

> In expounding this law the judgment of the court cannot, in any degree, be influenced by the construction placed upon it by individual members of Congress in the debate which took place on its passage, nor by the motives or reasons assigned by them for supporting or opposing amendments

1. Cong. Record, page 14508, 86th Cong. 1st Sess.
2. Cong. Record, page 8709, Part 7, Vol. 95, 81st Cong. 1st Sess.

that were offered. The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.

This view was reiterated in *United States* v. *Union Pacific R. R. Co.*, 91 U. S. 72, 79 (1875), in which the Court held that the railway company was not obligated to pay interest prior to maturity on bonds issued by the United States under statutes enacted in 1862 and amended in 1864. In reaching this conclusion, the Court said:

> In construing an Act of Congress, we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The Act itself speaks the will of Congress, and this is to be ascertained from the language used...

Gradually this strict interpretation gave way to more flexibility, and after 1890, some opinions considered committee reports to resolve ambiguities. There is still great reluctance, however, to give weight to debates on the floor. This is evidenced by the Supreme Court opinion in *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 316, 318-9 (1897), in which Justice Peckham discusses the effect of congressional debates upon the interpretation of statutes:

> It is also urged that the debates in Congress show beyond a doubt that the act as passed does not include railroads...
>
> There is ... a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body. [Cases cited *supra*.]
>
> The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed...

Necessarily, however, courts have come to give consideration to statements of particular Senators and Congressmen who are in charge of the bills, and also to colloquies and other material outside the language of the statute where doubt exists and construction is permissible.

Some extremely important decisions have turned directly on legislative debate involving a planned colloquy. A good example of such a decision was *Duplex Printing Co.* v. *Deering*, 254 U. S. 443, 475 (1921). This case involved a boycott in New York by a machinists union to compel a manufacturer to unionize its factory in Michigan. The Court of Appeals for the Second Circuit held that the Clayton Act forbade an injunction because it legalized "secondary boycotts". That decision was reversed by the Supreme Court on the ground that the legislative history of the Clayton Act showed that it was not the intention to legalize the "secondary boycott". The Court referred directly to the following colloquy which took place on the floor of the House between Congressman Webb, the manager of the bill, and Congressman Volstead:[3]

> *Mr. Volstead.* Would not this [Section 20 of the Clayton Act] also legalize the secondary boycott? ...
>
> *Mr. Webb.* Mr. Chairman, I do not think it legalizes a secondary boycott.
>
> * * *
>
> *Mr. Volstead.* ... Can there be any doubt this is intended, or does, in fact, legalize the secondary boycott?
>
> *Mr. Webb.* I will say frankly to my friend when this section was drawn it was drawn with the careful purpose not to legalize the secondary boycott, and we do not think it does. There may be a difference of opinion about it, but it is the opinion of the committee that it does not legalize the secondary boycott and is not intended to do so.
>
> * * *
>
> *Mr. Webb.* ... I should vote for the amendment offered by the gentleman from Minnesota [Mr. Volstead] if I were not perfectly satisfied that it is taken care of in this section. The language the gentleman reads does not authorize the secondary boycott, and he could not torture it into any such meaning. While it does authorize persons to cease to patronize the party to the dispute, and to recommend to others to cease to patronize that same party to the dispute, that is not a secondary boycott, and you cannot possibly make it mean a secondary boycott...

Nevertheless the Court of Appeals made it mean a secondary boycott, and it is quite possible that the Supreme Court could have interpreted it the same way had it not been for the above colloquy. The opinion of the Supreme Court includes the following:

> The majority of the circuit court of appeals, very properly treating the case as involving a secondary boycott, based the decision upon the view that it was the purpose of Sec. 20 to legalize the secondary boycott, "at least in so far as it rests on or consists of refusing to work for any one who deals with the principal offender." Characterizing the section as "blindly drawn," and conceding that the meaning attributed to it was broad, the court referred to the legislative history of the enactment as a warrant for the construction adopted. Let us consider this.
>
> By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body... But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure... *And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage...* (Italics added.)
>
> In the case of the Clayton Act, the printed committee reports are not explicit with respect to the meaning of the "ceasing to patronize" clause of what is now Sec. 20 ... the report was supplemented in this regard by the spokesman of the House committee (Mr. Webb), who had the bill in charge when it was under consideration by the House.

3. Cong. Record, pages 9652-9658, Vol. 51, Part 10, 63d Cong. 2d Sess.

Another such colloquy, also in the field of labor legislation, had a direct effect on a later decision by the National Labor Relations Board. During a debate on the Senate floor in 1949, Senator Pepper closely questioned Senator Taft regarding the effect of a provision broadening the jurisdiction of the NLRB which was contained in the Taft-Hartley Act. Senator Taft replied in positive language that under the Taft-Hartley law it was not the intention to broaden NLRB jurisdiction under the circumstances described by Senator Pepper. In *Hotel Employees Local No. 255* v. *Leedom*, 147 F. Supp. 308-9 (1957), affirmed 249 F. 2d 506 (1957), the District Court, in affirming the refusal of the NLRB to take jurisdiction, quoted the following statement of Senator Robert A. Taft on the floor of the Senate on August 30, 1949:

> ...The Taft-Hartley law did not change in any way the language providing for the jurisdiction of the Board, or the general definition of interstate commerce... It was not my intention in 1947, nor do I believe it was the intention of other members of the Committee on Labor and Public Welfare, to broaden or extend the jurisdiction of the Board in that respect. In fact, I feel very strongly that it should not be done... A hotel performs its service within four walls. It ships nothing into commerce. It produces no goods for commerce. In my opinion the Act was never intended to cover the hotel industry. [Quoted from St. Louis Hotel Association case, supra, at page 1390, citing *Congressional Record*, 81st Congress, First Session, pages 12,697 and 12,698.]

It is significant to note that this last colloquy occurred two years after the Taft-Hartley Act had been passed in 1947. Despite this, the comments of the author of the bill in the Senate had the effect of determining congressional intent.

One of the most recent colloquies that may bear upon the interpretation of a statute was that involving advances to the Highway Trust Fund during the fiscal year ending June 30, 1960. This colloquy took place on September 12, 1959, and in it Senator Holland, who was Chairman of the Appropriations Subcommittee on the Highway Bill, described his understanding that advances made from the general fund of the Treasury to the Highway Trust Fund would be repaid.

There is every reason to believe that we will have a continuing emphasis on such expressions of legislators during debate on the floors of Congress.

$800,000 Ford Grant for Legal Clinics; Plans Outlined for Its Use

A grant of $800,000 made to the National Legal Aid and Defender Association by the Ford Foundation, announced October 29 in New York, will be used over a seven-year period for expanded legal clinics and internship programs in selected law schools.

William H. Avery, of Chicago, President of the National Legal Aid and Defender Association, in making this announcement, said the law school projects will be designed to give broad educational experience in the public and social aspects of the law and of the lawyer's role in society. Mr. Avery further explained that administration of the grant will be supervised by an advisory group, the Council on Legal Clinics, to be appointed by the President of the National Legal Aid and Defender Association. The cooperation of the American Bar Association and the Association of American Law Schools has been assured, Mr. Avery said. Orison S. Marden of New York, past president of the NLADA, will head the policy group which will have representatives from the organized Bar as well as legal educators.

Mr. Avery emphasized that an important objective is to enlarge the horizons of law students as to the public service responsibilities of the legal profession. It is contemplated that the program will include student participation in legal aid clinics operated by law schools in cooperation with local bar associations and legal aid offices where they exist.

Seminars and lectures emphasizing the lawyer's obligations to his community and to his profession will probably be included in the program. Other clinical experience for students may be provided for research and service in defender and prosecutor offices, family and children's courts and bar association activities. Individual programs to fit local conditions and opportunities will be worked out in cooperation with participating law schools.

Law schools interested in participating in the program are invited to register their interest by letter to the National Legal Aid and Defender Association at its headquarters in the American Bar Center, Chicago 37, Illinois. The grant will probably be limited to approximately twelve law schools. However, it is hoped that the results will encourage these and many other law schools to adopt features of the program as a permanent part of their curricula, Mr. Avery pointed out. A further announcement will be made following organization of the National Council of Legal Clinics and the appointment of a project administrator, Avery said.

Tax Notes

Prepared by Committee on Bulletin and Tax Notes, Section of Taxation, Kenneth H. Liles, Chairman; John M. Skilling, Jr., Vice Chairman.

The Changing Complexion of the "B" Reorganization

By Burton W. Kanter, Chicago, Illinois

The term "'B' reorganization" has long symbolized a particular transaction—a voting stock for stock exchange, without any cash or other property ("boot") as part of the consideration, whereby the acquiring corporation obtains not less than 80 per cent of the voting stock and not less than 80 per cent of all the shares of any other classes of stock of the corporation being acquired. The tax result of the transaction has been that the gain realized on the exchange by each shareholder of the acquired corporation would not be recognized. Failure to consummate the particular transaction has meant there was a taxable exchange and that the entire gain realized would be recognized and, depending on the shareholder's holding period for his stock, taxed as long term capital gain. These have been the only two alternative tax results, and have depended solely on whether or not there was a qualified B reorganization.

What it is that the B reorganization currently symbolizes, however, is changing—both the transaction and the tax results. The decisions of *Grover D. Turnbow*, 32 T.C. — No. 57 (1959), and *Howard* v. *Commissioner*, (7th Cir., 1956) 238 F. 2d 933, reversing 24 T.C. 792 (1955), have given the B reorganization under both the 1939 I.R.C. and the 1954 I.R.C. a new complexion,[1] and the Subchapter C Advisory Group recommendations on corporate distributions and adjustments now pending before Congress as H.R. 4459 would change further even this new look.

Turnbow and Howard Decisions

In *Turnbow*, taxpayer in 1952 exchanged all of the stock of his company for stock of a national dairy concern and in addition $3,000,000 in cash. The stock taxpayer received had a fair market value of $1,235,625, only some 29 per cent of the total consideration he received for his shares. The Commissioner determined that taxpayer's full gain on the exchange was to be recognized under 112(a) on the ground that the transaction did not qualify as a 112(b)(3) tax free exchange since there was no B reorganization as defined in 112(g)(1)(B), the exchange not being "solely for stock of the acquiring corporation". The Tax Court, however, held that 112(c)(1) modifies not only the operative taxing provision of 112(b)(3) but also the definition provision of 112(g)(1)(B), so that despite the receipt by taxpayer of cash as well as stock, the transaction constituted a reorganization and taxpayer's realized gain was to be recognized only to the extent of the cash (boot), a substantially lesser amount.

The holding in *Turnbow* is the same as that of the Court of Appeals in *Howard*, reversing the Tax Court. In *Howard*, 80.19 per cent of the stock of one corporation was acquired from various stockholders in exchange for stock of another corporation. Additional shares were acquired from other stockholders for cash. With one exception, each stockholder received either all cash or all stock for his stock. The Court of Appeals agreed with the Tax Court that because of the cash payment involved in the transaction the "solely" requirement of 112(g)(1)(B) was not met and the exchanges involved were not tax free under 112(b)(3). But the Court of Appeals nevertheless rejected the Commissioner's contention that "there must be a qualifying reorganization within the meaning of §112(g)(1)(B) . . . before §112(c)(1) can come into play", and held that 112(c)(1) was applicable since "but for the cash received . . . the transaction would have met the 'solely' requirement of §112(g)(1)(B) and fallen within the scope of §112(b)(3)". Taxpayer, however, had received no boot and therefore none of his gain was recognized under 112(c)(1).

The Court of Appeals in *Howard*, and now the Tax Court in *Turnbow*, thus have chosen to give effect to 112(c)(1) (356(a)(1), I.R.C. 1954) over 112(a), 1002 I.R.C. 1954). The Commissioner considered that 112(c)(1) made it possible for boot to be received in the course of a reorganization without destroying qualification under the statute but that this leeway was not extended to a B reorganization. *Turnbow* and *Howard*, on the other hand, considered 112(c)(1) applicable to permit boot in a B reorganization and thus ruled out any meaning for 112(a) wherever even a single share of qualified stock of an acquiring corporation is given by such corporation in an exchange, since no amount of boot would appear to disqualify the reorganization. In such circumstances 112(a), which recognizes the full gain, can never apply, and the only gain recognized

1. The statutory complex of the 1939 I.R.C. affecting the B reorganization is not significantly dissimilar from that under the 1954 I.R.C., and the issues of the *Turnbow* and *Howard* cases clearly arise under both. The general rule that gain realized on the exchange of property is recognized except as otherwise provided is set forth in 112(a) and 1002 respectively. However, no gain or loss is recognized under 112(b)(3) and 354(a)(1) if an exchange of stock or securities in a corporation a party to a reorganization, in pursuance of a plan of reorganization, is solely for stock or securities in such corporation or in another corporation a party to a reorganization. With only minor language differences 112(c)(1) and 356(a)(1) provide that if the exchange would have qualified under 112(b)(3) and 354(a)(1) but for the receipt of cash or property ("boot") other than the permissible stock or securities then the gain is not recognized in full under 112(a) and 1002, but is recognized only in an amount not in excess of the boot. What constitutes a reorganization, pursuant to which an otherwise qualified exchange will be subject to the taxing rules of 112(b)(3) and 354(a)(1), or 112(c) and 356(a) is set forth in the definition sections 112(g) and 368(a), the B reorganization being covered in 112(g)(1)(B) and 368(a)(1)(B).

will be under 112(c)(1) limiting the amount to the boot, unless some court-engrafted "continuity of interest" rule such as exists for the statutory merger, is adopted, despite the fact that it was the necessity for any such rule which the 80 per cent rule under the B reorganization was thought to eliminate.

Tax Court Reverses Itself Without Review

The *Turnbow* decision has the unusual effect of reversing the Tax Court's own final decision in *Hubert E. Howard* without benefit of court review, which is normally required of an opinion overruling a prior decision. Review is avoided by considering the 112(c)(1) issue "a question which was not reached" by the Tax Court in *Howard*, and by treating the earlier Board decision in *Luther Bonham*, 33 B.T.A. 1100 (1936), as being in accord with the Court of Appeals' view in *Howard* and controlling in *Turnbow*.

But the Tax Court in *Howard*, on a motion for reconsideration, did consider, and by denying the motion rule on, the specific issue of the applicability of 112(c)(1). Briefs covering the point were even submitted by both respondent and petitioner, and when respondent suggested on appeal that the applicability of 112(c)(1) was not raised below by petitioner and that petitioner should not be allowed to raise the issue on appeal, the Court of Appeals said, "it appears that it was squarely raised in petitioners' Motion for Reconsideration, to which respondent presented objections, and which was denied by the court".

The difficulty with the reliance on *Bonham* is that there the Board did not have before it the precise issue presented in *Turnbow*. The then applicable definition of reorganization did not include the word "solely" and was simply the acquisition of at least a majority of the voting stock and at least a majority of the total number of shares of all classes of stock in another corporation. The Board held, that the transaction involved having first qualified within the then definition of reorganization, the applicability of the taxing provision of 112(c)(1) was to be determined by whether or not the exchange, in pursuance of a reorganization, would have fallen within the tax free treatment rule of 112(b)(3) were it not for the receipt of cash as well as stock. The Board did not decide that the reorganization definition and the operative taxing provision under 112(b)(3) are both modified by 112(c)(1). This precise issue could not arise then because the presence of cash in *Bonham* was not considered to affect qualification of the transaction as a reorganization under the then definition.[2]

1954 Code Supports Commissioner

Substantial support for the Commissioner's view in *Turnbow* is to be found in the reorganization definition provisions of the 1954 I.R.C. Both the B and C reorganization definitions are substantially the same under the 1939 I.R.C. and the 1954 I.R.C. Yet 368(a)(2) under the 1954 I.R.C. provides a new rule to permit the allowable consideration in a C reorganization to include some boot. Clearly Congress must have believed it necessary, because of the word "solely" in the C reorganization definition, to make special provision to permit the receipt of some boot in a qualified C reorganization, and did not believe it sufficient to rely on 361(b) (applicable in the case of a C reorganization and essentially the same as 356(a) applicable in case of a B reorganization) to permit boot in the reorganization. Any argument to the effect that 368(a)(2) was intended only to limit the amount of boot permissible in the C reorganization is not in accord with the legislative history of 368(a)(2), but more important, if true, means that 368(a)(2) would have been totally ineffective to do so under the *Turnbow* and *Howard* decisions, since the boot rule of 361(b) would presumably modify both the taxing provision of 361(a) as well as the definition provision of 368(a)(1)(C) and consequently 368(a)(2). Congress appears therefore to have recognized the principle that the reorganization definition first must be met independent of the boot provision before the boot provision can become effective, otherwise it was certainly unnecessary to write 368(a)(2) into the Code.

Taxpayer in *Howard* received only stock for his stock and no boot so none of his gain was recognized. Taxpayer in *Turnbow*, however, received both stock and cash for his stock, and his gain was recognized to the extent of the boot. Should the recognized gain be taxed as capital gain or as a dividend? This issue was not raised in *Turnbow*.[3]

Under 112(c)(2) and 356(a)(2) a distribution, made in pursuance of a plan of reorganization and subject to the boot rule (112(c)(1) and 356(a)(1)), which has the effect of the distribution of a dividend, is to be taxed to the recipient of boot as a dividend to the extent of available earnings and profits of the acquired corporation. The balance of any recognized gain is taxed as a capital gain. Ignoring the problem of whether there is an automatic dividend equivalence rule (*Commissioner* v. *Estate of Bedford*, 325 U. S. 283 (1945)) or whether a case-by-case factual determination of the "effect" of the distribution is required for dividend treatment, it is clear that once boot is permitted in a B reorganization recognized gain may be properly taxable as a dividend.[4]

2. If anything, the Board Opinion in *Bonham* might better have been construed in *Turnbow* to support the Commissioner rather than the petitioner. The Board stated that the applicability of 112(c)(1) depended on 112(b)(3) and looked at the transaction before it as if the cash were omitted only to determine the applicability of 112(c)(1) in the light of 112(b)(3) and not in light of the reorganization definition as well. The Board appears to have accepted the view that in order to get to 112(b)(3) the exchange must have first qualified as a reorganization under the terms of the definition provision without consideration of any other provision, a condition in fact met in *Bonham*.

3. *Turnbow* reported his gain to the extent of the boot received as long-term capital gain. The Tax Court in sustaining taxpayer and entering a decision under Rule 50 does not imply that the gain should be treated otherwise. Also, there is no indication in the Court's report as to whether taxpayer's corporation had available earnings and profits to support any dividend treatment.

4. There may be a problem of statutory interpretation under both 112(c)(2) and 356(a)(2) to reach dividend treatment. Under 112(c)(2) and 356(a)(2) reference to earnings and profits is to "the" corporation, but which corporation —the acquiring or the acquired corporation? The boot received is part of the consideration physically passing from the acquiring corporation; this is therefore "the" corporation physically making the distribution which has the effect of a dividend. But it makes no sense for this to be "the" corporation since it is the acquired corporation from which the dividend bail out has occurred. This language difficulty sharply points up the logical difficulty in accepting the application of 112(c)(1) to a B reorganization. But if boot is to be permitted in a B reorganization, then it would seem that reliance on the clear purpose of the section and emphasis on the words "has the effect" will be sufficient to hold that regardless from which corporation the distribution physically takes place the effect is that of a distribution of a dividend from the acquired company. See *Ross* v. *U. S.* (Ct. Cl., 1959), 59-2 U.S.T.C. ¶9493.

Under 356(a)(1) the amount of the dividend is the fair market value of the boot (to the extent of available earnings and profits) in the case of both corporate and non-corporate shareholder recipients. With respect to the corporate shareholder recipient this is in contrast to a 301 dividend distribution of property in kind where the amount of the dividend under 301(b)(1)(B) is the lesser of the fair market value of the property distributed or the adjusted basis of the property distributed in the hands of the distributing corporation. But Reg. §1.356-1(d) specifically states that 301(b)(1)(B) and 301(d)(2) do not apply to a distribution of property to a corporate shareholder if the distribution falls within the provisions of 356.

For those who have expected capital gain on their cash or property receipt in a transaction not thought to qualify as a B reorganization, not only may the tax effect, as a result of *Turnbow* and *Howard* permitting boot in the B reorganization, be treatment of the cash or property receipt as a dividend, but worse yet a dividend to which the normal dividend relief provisions are not applicable. Corporate recipients of dividend distributions are normally entitled to an 85 per cent dividend received deduction under 243 and non-corporate recipients to a $50 exclusion from income plus a 4 per cent dividend received credit under 34 and 116. It has sometimes been assumed (see Mertens, *Code Commentary* §356(b)(1) that no distinction would exist in application of these dividend relief provisions between a normally declared dividend taxable under 301 and 316 and any other form of taxable dividend distribution, *e.g.*, under 333 or 356. But the Internal Revenue Service has recently ruled[5] that amounts treated as dividends under 356(a)(2) are not eligible for the credit, exclusion and deduction provided for by 34, 116 and 243. This position is based on the language of Reg. §1.34-3 which refers only to "distributions of property defined as dividends by section 316", and similarly the limited reference in Reg. §1.243-1 to only §§1.310-1 and 1.316-1. While arguments can certainly be urged that this difference in application of the dividend relief provisions should not properly exist,[6] it is clear that if as a result of *Turnbow* and *Howard* a dividend results it will have been better for the recipients of boot to have made a dividend distribution prior to the reorganization, an approach to the B reorganization type of transaction rarely, if ever, before considered by tax men.

Advisory Group Proposals

The Subchapter C Advisory Group proposals would reverse the rule of *Turnbow* and *Howard*, and also reverse the result in *Turnbow*, but leave the result in *Howard* unchanged.

The Advisory Group proposes to reverse the rule of the *Howard* case (and now in effect the *Turnbow* case as well) by amending 356(a) "to make clear that it operates only in a transaction which, independent of its provisions, qualifies as a reorganization under section 368...", specifically by changing the introductory words of 356(a)(1) to read: "If section 354 would apply to an exchange made pursuant to a plan of reorganization ... but for the fact—". The Group believes that by this change in language, "the boot provision will be inapplicable unless the transaction would constitute a reorganization aside from the application of section 356".

The intention of the Advisory Group in this respect is abundantly clear, but query whether the proposed modification of statutory language standing by itself is clearly adequate to carry out this intention? While 356(a)(1) does not now, and 112(c)(1) did not, contain any phrase limiting the exchange referred to, to an exchange made "pursuant to a plan of reorganization", 112(b)(3) and 354(a) both have provided that the exchange to qualify must be "in pursuance of the plan of reorganization", and phrases not significantly dissimilar have appeared in Reg. 118, §39.112(g)-4 (and its predecessor Reg. 111, §29.112(g)-4) and in the opinion of the Board in the *Bonham* case, both sources of authority relied on by the Tax Court in *Turnbow* to reach the very conclusion the Advisory Group intends to reverse by incorporation of this language into 356(a)(1). It would seem therefore that perhaps other language should be adopted to bring about the Advisory Group's intended change.

The proposed change of the *Howard* rule would not change the result in *Howard* because of other changes in the reorganization provisions proposed by the Advisory Group. Under the Group's proposals the B reorganization would be viewed from two levels, so that with respect to each individual shareholder of the acquired company there would be a B reorganization (1) if at least two thirds of the consideration he received for his stock is qualified stock of the acquiring corporation, the balance of the consideration may be cash or other property without destroying the B reorganization as to the particular shareholder, and (2) if the acquiring corporation has control of the acquired corporation immediately after the exchange or within six months thereafter. Because taxpayer in *Howard* received only stock in exchange for his stock, and the requisite control under the proposed reorganization definition was obtained by the acquiring company there would be no change in the result in *Howard*. In *Turnbow*, however the consideration taxpayer received for his shares consisted of more than two thirds cash rather than stock so there would be no B reorganization. The result in *Turnbow* therefore would be as determined by the Commissioner, taxation of the full gain realized as long term capital gain.

Since the allowable consideration in a B reorganization under the Group's proposals may consist of cash or other property, the boot problems which would have never arisen under the 1939 and 1954 Codes except for the *Turnbow* and the *Howard* decisions, are as a consequence directly raised by the Group's definition of a B reorganization. Thus, the Group's proposals

5. See *U. S.* v. *E. I. duPont de Nemours and Company* (D.C. N.D. Ill. October 2, 1959) at page 9, reflecting a letter ruling issued by I.R.S. July 8, 1959.

6. In particular, there is nothing in the language of the applicable Code provisions to support the Service position and there is some authority to the contrary. See, *e.g.*, *Commissioner* v. *Forham Realty Corp.* (2d Cir., 1935) 75 F. 2d 268; *John S. Woodard*, 30 B.T.A. 1216 (1934). But see Mertens CODE COMMENTARY §243(a)(2), regarding a comparable problem raised if the opposite view is accepted, *i.e.*, application of the 85 per cent dividend received deduction to the fair market value of the property distribution instead of only the adjusted basis of the property in the hands of the distributor.

also include a revision of the boot rule. The boot rule would no longer be related to gain realized on the exchange. Instead, boot would be taxed apart from any gain realized as though it were a corporate distribution apart from the reorganization. The tax character of the distribution would be determined on the basis of the treatment which in the circumstances would have been accorded such a distribution under 301, 302, 331 and 346 if made from the acquired company and there had been no reorganization. The proposed revision of 356(b) providing that the distribution can have the effect of a dividend, however, by specifically treating the dividend as such under 301, would seem to overrule the present Service position on the nonapplicability of the dividend relief provisions of 34, 116 and 243 to a boot dividend. Also, the present rule that a corporate shareholder recipient of boot to be treated as a dividend in the case of a reorganization takes the boot into account at its fair market value would no longer be applicable; instead the 301 rule with respect thereto would be in effect.

Conclusion

Corporations contemplating corporate acquisitions for stock and cash today, as well as those which have engaged in such transactions, are in an area of uncertainty. The only safe rule to be guided by still is that a voting stock for stock exchange without boot will be tax free. The converse rule is no longer certain. Once boot is in the picture with the *Howard* and *Turnbow* decisions on the books, the results in any situation could be variously: (1) full recognition of all gain as capital gain; (2) recognition of gain to the extent of boot as capital gain; (3) recognition of gain to the extent of boot as a dividend to the extent of available earnings and profits of the acquired company and capital gain to the extent of any excess; (4) recognition and dividend treatment as under (3) but possibly with or possibly without the benefit of the dividend relief provisions. But all this is only for the short present, for consideration must now also be given to what will soon be the rules if the proposed legislation is passed in the form recommended by the Advisory Group.

Notice by the Board of Elections

The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1960 Annual Meeting and ending at the adjournment of the 1963 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

A State Delegate will be elected in Massachusetts to fill the vacancy for the term ending at the adjournment of the 1962 Annual Meeting.

A State Delegate will be elected in Rhode Island to fill the vacancy for the term ending at the adjournment of the 1961 Annual Meeting.

Nominating petitions for all State Delegates to be elected in 1960 must be filed with the Board of Elections not later than April 1, 1960. Petitions received too late for publication in the April issue of the JOURNAL (deadline for receipt March 1) cannot be published prior to distribution of ballots, which will take place on or about April 11, 1960.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1155 East 60th Street, Chicago 37, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M., April 1, 1960.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such state.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Any member of the Association in good standing in a state where the election is being held is eligible to be a candidate. There is no limit to the number of candidates who may be nominated in any state and nominations are made only on the initiative of the members themselves. While more than the required minimum of twenty-five names of members in good standing may appear on a nominating petition, special notice is hereby given that no more than twenty-five names of signers of any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Walter V. Schaefer, Chairman
Harold L. Reeve
Robert B. Troutman

BAR ACTIVITIES

Constant acceleration in pace and increasing breadth in scope have marked the development of the Continuing Legal Education Program in the State of Washington during the past few years. The major portion of the program is carried on under the joint sponsorship of the Washington State Bar Association and the University of Washington School of Law. At the present time one-day programs are presented by traveling teams of experts in four cities conveniently located throughout the state: Seattle, Olympia, Yakima and Spokane. During the 1959-1960 season two of the programs will be devoted to consideration of the new rules of civil procedure which become effective in Washington on January 1, 1960. "Municipal Law and Your Clients" is the title of another program, and the fourth is entitled, "Proof of Damages—Courtroom Presentation". Annotated summaries of the speeches are mimeographed, bound and distributed to those attending the programs.

At each of the programs a luncheon speaker, frequently a University faculty member, discusses a non-technical subject of broader vein but of special interest to lawyers. During the coming year luncheon speeches will include such subjects as "Law and Freedom", discussed by a historian, "The Effect of Publicity upon Crime and Correctional Techniques", discussed by a sociologist, "What a Lawyer Should Know About Investments", discussed by a professor of finance, and "A Social Worker's View of Domestic Relations and the Law", discussed by a sociologist.

Particularly well received have been those programs sponsored by the bar association and the law school which are devoted to medical problems. In lieu of the common discussion of both medical and legal problems in the litigation of cases involving particular types of injuries, these programs have been expositions of principles of general applicability and orientation. For example, in 1958 a series of eight lectures was presented, once in Seattle and once in Yakima, on "Basic Anatomy and Physiology for Lawyers". In 1959 a successor series of eight lectures was presented under the title, "Principles of Orthopaedics for Lawyers". Next year a series of lectures will be presented on neurology. The enthusiastic response of lawyers attending gives support to the assumption that lectures so organized have a greater and more permanent value than a mélange of medical and legal observations about particular and individual injuries.

Plans for the future envisage the presentation of short specialized programs in various subjects, such as water law, timber deeds, Indian affairs, etc. Also planned are programs of greater duration, perhaps for as long as two weeks, giving intensive instruction to lawyers in residence at the University in problems such as those in the taxation field.

Of course, the more traditional continuing legal education activities are not neglected. At each annual meeting of the bar association a wide variety of legal institutes are faithfully attended by the many lawyers registered. In addition, local bar associations are very active in presenting luncheon speakers on topics of current interest to lawyers and in organizing special practice programs for young lawyers.

The 61st Annual Meeting of The Colorado Bar Association was held at the Broadmoor Hotel in Colorado Springs, October 15-17. Over six hundred lawyers registered for the meeting, making the attendance the largest for any annual meeting of the association.

The highlight of the meeting was the program sponsored by the Negligence Law Section on "Cross Examination of Medical Witnesses in a Case Involving Trauma and Cerebral Stroke". Participating in this mock trial were Harry A. Gair and Emil Zola Berman, of New York City.

Philip S. Habermann, Executive Director of the State Bar of Wisconsin, spoke at one of the programs on "The Efficient Management of a Law Office", and Kline D. Strong, of Salt Lake City, Utah, described the "Sans Copy System", a method of keeping time records.

A portion of the program was devoted to "The Legal Aspects of Alcoholism—Our No. 1 Social Problem". Participating in the program were Joseph D. Lohman, Chicago; Judge John M. Murtagh, New York City; and Judge Ray Harrison, Des Moines, Iowa.

The Mineral Law Section sponsored a program on "Can the American Mineral Industry Survive?" while the Taxation Law Section program included on its program Martin Atlas, of Washington, D. C., who spoke on "Tax Aspects of Real Estate Transactions". Also on the program were Warren L. Jones, Jacksonville, Florida, who spoke to the University of Denver Law School alumni; Moses Lasky, San Francisco, who spoke to the University of Colorado Law School alumni; and Dr. Marvin Block, who spoke to the county judges on "Alcoholism in the Courts".

Entertainment was provided at an evening show entitled "Lady Loverly's Chattels" produced by the Law Club of Denver and directed by Jay W. Tracey, Jr., of the Denver Bar. At a luncheon on Saturday, the ladies were told "How To Live with a Lawyer" by Philip von Ammon, of Phoenix. Robert J. Farley, Dean of the University of Mississippi School of Law, presented a very humorous talk at the banquet.

American Bar Association President John D. Randall, of Cedar Rapids, Iowa, was the featured speaker at one of the luncheon meetings. His topic was "The American Lawyer: Craftsman of Legislation". Other highlights included the presentation of the annual Award of Merit to James K. Groves, of Grand Junction, past President of The Colorado Bar Association and current member of the House of Delegates of the American Bar Association. William R. Kelly, of Greeley, also a past

Raphael J. Moses

President of The Colorado Bar Association, was presented with a fifty-year honorary life membership certificate.

At the annual business meeting, the members of The Colorado Bar Association adopted a resolution establishing a "Lawyers Fidelity Fund" in Colorado. A committee will soon be appointed to administer this fund and the plan will get underway January 1, 1960.

New officers of The Colorado Bar Association elected at this meeting were: Raphael J. Moses, Alamosa, President; Samuel S. Sherman, Jr., of Denver, President-Elect; Louis G. Isaacson, of Denver, Senior Vice President; and Richard H. Simon, of Englewood, Robert S. Gast, Jr., of Pueblo, and James H. Mosley, of Craig, Vice Presidents. Arch L. Metzner, Jr., and Donald S. Molen, of Denver, were re-appointed Treasurer and Executive Secretary, respectively.

Flavel A. Wright

The Sixtieth Annual Meeting of the Nebraska State Bar Association had a total lawyer registration of 779. In addition thirty-two exhibitors registered and enough wives were in attendance to bring the total registration well above many previous meetings.

In keeping with the 1959 objective of the Association, which was continuing legal education, all sections conducted programs designed to aid the lawyer in his practice.

The highlight of the program of the Section on Real Estate, Probate and Trust Law was the discussion of will and trust forms by William E. Murray, of the New York Bar. This was followed by reports of the several subcommittees of the Section.

Speakers before the Section on Municipal and Public Corporations were Warren C. Johnson, of the Lincoln Bar, and Harry S. Salter, attorney for the Department of Roads.

The Section on Insurance Law devoted its program to a discussion of practice and procedure under the Nebraska Workmen's Compensation Act. Participants were Judge Albert Arms, of the Nebraska Workmen's Compensation Court; A. W. Storms, of Holdrege; Kenneth Elson, of Grand Island, and John E. Dougherty, of York.

The Section on Practice and Procedure had as its guest speaker James A. Dooley, of Chicago, whose topic was "Trial Tactics—How To Win the Verdict". This was followed by a discussion of new legislation affecting procedure led by David Dow of the faculty of the University of Nebraska College of Law.

The Section on Taxation devoted its program to a discussion of phases of the law affecting Nebraska property taxes. Speakers on this program were Homer Hamilton, Assistant Attorney General of Nebraska; Richard E. Hunter, of Hastings; Charles E. Oldfather, of Lincoln; Edmund D. McEachen, of Omaha, and John C. Burke, Tax Attorney in the office of the County Attorney of Douglas County.

Guest speaker at the Association luncheon was John D. Randall, of Cedar Rapids, Iowa, President of the American Bar Association. His fellow Iowan, Carl F. Conway, of Osage, Iowa, President of The Iowa State Bar Association, was one of the most entertaining speakers the Association has ever had to address the Annual Dinner.

The meeting closed with the installation of new officers. Flavel A. Wright, of Lincoln, is the newly elected President. Thomas C. Quinlan, of Omaha, assumed the office of President-Elect and C. Russell Mattson, of Lincoln, was elected to serve a second term as Member at Large of the Executive Council.

Ilus W. Davis

The annual meeting of the Missouri Bar held in Kansas City, September 30-October 3, was the largest and most enthusiastically received of any meeting in the history of the State Bar, according to retiring Bar President Clarence O. Woolsey, of Springfield. Nearly 1500 lawyers and their wives attended.

Ilus W. Davis, of Kansas City, was elected President to succeed Mr. Woolsey. Fred E. Eppenberger, of St. Louis, was named Vice President, and Jackson A. Wright, of Mexico, was elected Secretary. Reappointed as Treasurer *ex officio* was Marion O. Spicer, of Jefferson City, Clerk of the Supreme Court. Wade F. Baker, of Jefferson City, is Executive Director.

One of the highlights of the meeting was the Labor Law Institute which dealt with the new federal labor legislation. Joseph A. Jenkins, of the National Labor Relations Board, and Martin F. O'Donoghue, Chairman of the court-appointed monitors of the Teamsters Union, spoke on their experiences in those positions.

An overflow audience attended the two-day Law Office Management Institute held in conjunction with the meeting. Lester Gross, of St. Louis, Chairman of the Economics of the Bar Committee, gave a full report on the 1958 survey of lawyers' incomes made by the Missouri Bar. Also on the program was Sanford Rafsky, a management consultant of S. J. Capelin Associates of New York, who reported on the results of their survey of the business practices of Missouri law offices, and presented recommendations for improving techniques of office management, billing and client relationship.

Kline Strong, of Salt Lake City, discussed the Sans Copy process of record keeping for law offices.

John D. Randall, President of the

American Bar Association, addressed the opening session, stressing the importance of continued legal education and the responsibilities of the Bar.

President Woolsey reported on the progress of plans for establishing a continuing legal education program in Missouri, and on the need for a permanent headquarters for the Bar.

Judge Walter L. Pope, of the United States Court of Appeals for the Ninth Circuit, San Francisco, gave the principal address at the Annual Dinner.

Activities for the Wives of Missouri Lawyers included a luncheon fashion show for a capacity crowd of 320 and tours of the Truman Library and the Nelson Art Gallery.

More than 100 persons attended the traditional Senior Counsellor's Breakfast, honoring those who have practiced law for 50 years or who have reached the age of 75.

Ellis L. Yatman

The Rhode Island Bar Association held its Annual Meeting on Monday, October 5, at the Sheraton-Biltmore Hotel in Providence, Rhode Island.

The one-day program began with the showing of a film, "A Visit to the Providence County Court House", which was produced for Law Day, 1959, in cooperation with the Justices of the Rhode Island Supreme Court, the Justices of the Rhode Island Superior Court, the Rhode Island Bar Association and Station WPRO-TV, Providence. The film is to be used in connection with the Association's Speakers' Bureau.

The business meeting followed with reports of committees which indicated an encouraging increase in Association activities in all fields. Projects, both new and continued, were discussed for the coming year.

The Annual Dinner was attended by 192 out of 830 members of the Association. Retiring President William H. Edwards presided. Chief Justice Raymond S. Wilkins of the Supreme Judicial Court of Massachusetts was guest of honor and the principal speaker. Other distinguished guests were Chief Justice Francis B. Condon of the Rhode Island Supreme Court and Presiding Justice Louis W. Cappelli of the Rhode Island Superior Court and most of the Associate Justices of the two courts.

Senator Theodore Francis Green, of the U. S. Senate, who celebrated his ninety-second birthday the day before the meeting, was hailed by the group. A similar round of applause greeted retired Probate Judge John C. Burke, formerly of the Probate Court of the City of Newport. As he took his place at the head table, it was noted by President Edwards that "Judge Burke had reached the rollicking age of 18 months when Senator Green was born."

Elected as officers for the coming year were the following: President, Ellis L. Yatman; President-Elect, Sayles Gorham; Vice President, James H. Higgins, Jr.; Secretary, Julius C. Michaelson; Treasurer, Francis X. LaFrance. Members of the Executive Committee are Leo T. Connors, Chairman, James C. Bulman, Edward L. Gnys, Jr., Roland E. Meunier and Vincent Pallozzi. All officers and members of the Executive Committee are from Providence with the exception of Mr. Meunier, who is a member of the West Warwick Bar.

In sending the account of this meeting to the JOURNAL, the ingenious Executive Secretary, Edward P. Smith, wrote: "Attached is a program of the meeting and a picture of Ellis L. Yatman, newly elected President. No picture was available—I snapped it this morning!"

Rignal W. Baldwin

Leonard L. Greif, Jr.

Rignal W. Baldwin was installed as President of the Bar Association of Baltimore City at its annual dinner meeting at the Lord Baltimore Hotel in June.

In his acceptance speech, Mr. Baldwin called for an enlargement of the public relations program, more emphasis on the lawyers referral service to stimulate public recognition, a committee to consider a client's security fund, a merger of the local bar associations including the Plaintiffs' Bar Association, the Monumental Bar Association and the Women's Bar Association with the Baltimore City Bar Association, the appointment of an executive secretary and a permanent business headquarters.

The other officers of the Association are First Vice President, Edwin J. Wolf; Second Vice President, Joseph G. Finnerty; Treasurer, F. Edward Wheeler; and Secretary, Edward A. Smith.

Activities of Sections

John W. Morgan

Fabian Bachrach

SECTION OF LABOR RELATIONS LAW

At the annual meeting of the Section in Miami on August 24 and 25, a highlight was the report of the Section's Committee on NLRB Practices and Procedure, presented by the Committee's Co-Chairmen, Plato E. Papps, of Washington, D. C., and Harry S. Benjamin, Jr., of Detroit, Michigan, which was highly critical of the National Labor Relations Board. The Committee complained of the Board's inaction in respect to the recommendations adopted by the House of Delegates in 1958 for changes in the Board's practices and procedure which resulted from previous reports of the Section. The report recommended that there be no future meetings with the Board, but that instead the Association recommendations be submitted to the Senate and House Labor Committees.

NLRB member, Joseph A. Jenkins, spoke at the Section meeting and suggested that the Section appoint a committee to work with the Board on this specific problem. He also assured the Section that he would move for adoption of the Section's recommendations, as approved by the House of Delegates, upon his return to Washington. After Mr. Jenkins' speech, the Council voted to accept the committee's report but to defer action on the committee's recommendations until the mid-winter meeting of the Section's Council. Section Chairman William J. Isaacson, of New York City, made it clear that the Section's Council concurred fully in the criticisms leveled at the Board by the Committee. There was a sharp debate among Section members as to whether action should be deferred and the vote to defer action carried by two votes. Those supporting the motion for deferment made it clear that they believed the Board had not dealt fairly with the committee, but expressed a belief that it would do so as a result of Board member Jenkins' assurances.

Other reports at the Section meeting included that of the Committee on the Law of Government Employee Relations presented by Chairman Ida Klaus, Labor Relations Consultant to the City of New York. This report contained case histories on the effect of collective bargaining in New York City, Cincinnati, Philadelphia and Cleveland. The report on Federal Labor Standards Legislation submitted by the Committee headed by David Ziskind, of Los Angeles, California, and Laurence I. Wood, of New York, New York, treated with proposed amendments to the Davis-Bacon Act, which requires payment of prevailing minimum wage rates on federally financed construction projects. Professor Robert Koretz, of Syracuse, presented the report of the Committee on State Labor Legislation which was concerned principally with the problem of federal preemption in the field of labor relations. The Committee on the Development of the Law Under the National Labor Relations Act submitted a 111-page report which the Section will publish as a monograph. Co-Chairmen of this Committee were Professor Bernard D. Meltzer, of the University of Chicago, Bernard Dunau, of Washington, D. C., and Lawrence M. Kearns, of Boston, Massachusetts.

Other reports were those of the Railway Labor Law Committee, of which Edward J. Hickey, of Washington, D. C., is Chairman, which concluded that the subject of amendments to the Railway Labor Act is worthy of study, and the report of the Committee on Labor Arbitration headed by Arthur J. Goldberg, of Washington, D. C., and Robert Levitt, of New York, New York, which cited the increasingly important and constructive role of the legal profession in labor arbitration and denied claims of non-lawyers that lawyers and the law have introduced excessive technicality into the labor arbitration process. This latter charge of "creeping legalism" was examined at length and any charge that it is fostered in an improper sense by experienced practitioners in the labor relations field was found to be unwarranted.

John W. Morgan, of Boston, was elected Chairman of the Section. In addition to the election of Mr. Morgan, Edwin Pearce, of Atlanta, Georgia, was elected Vice Chairman and Professor Paul R. Hays, of Columbia University Law School, was elected Secretary. He succeeds Professor Archibald Cox, of Harvard Law School, who served as Secretary of the Section for many years. L. N. D. Wells, Jr., of Dallas, Texas was elected Section Delegate to the House of Delegates, and members of the Council, in addition to the officers and last retiring Chairman, include the following: Morris P. Glushien, of New York, New York; John H. Morse, of New York, New York; Tracy H. Ferguson, of Syracuse, New York; Louis Sherman, of Washington, D. C.; Marion B. Plant, of San Francisco, California; Thurlow B. Smoot, of Cleveland, Ohio; C. Paul Barker, of New Orleans, Louisiana; and Frank A. Constangy, of Atlanta, Georgia.

The Section members were high in their praise of retiring Chairman, William J. Isaacson, of New York City, for the progress of the Section under his leadership. Mr. Isaacson has recently been appointed Deputy Industrial Commissioner of Labor in New York by Governor Nelson D. Rockefeller.

A. H. Raskin, labor correspondent for the *New York Times*, was guest speaker at the Section luncheon and gave a timely and highly interesting talk on the steel strike. George Moskowitz, Chairman of the New York State Board of Mediation, explained the functions of that board, and Saul Corbin, Assistant Counsel to Governor

Rockefeller, analyzed the recent New York Labor and Management Improper Practices Act.

SECTION OF MUNICIPAL LAW

The committees of the Municipal Law Section are already at work for the current year. In order that the committees might start immediately, the council decided last summer that committee appointments would be reaffirmed for the coming year and that further requests for committee appointments would hereafter be made in the spring for the following year.

A new committee, called Junior Bar Conference Committee, was created at the Miami meeting, and the two committees, Municipal Housing and Urban Renewal, were combined.

Frank M. Covey, Jr., of Chicago, has been appointed chairman of the Junior Bar Conference Committee. Members of the committee are members of both Sections. The purpose of the committee is to increase the interest of the younger lawyers in the work of both Sections and to make sure that the viewpoints of the younger lawyers are presented in the Municipal Law Section Meetings.

An important change in the committee structure was the creation of a new Committee on Legal Affairs of Smaller Cities in place of the Committee on Problems of Non-Metropolitan Municipalities. Tom E. Davis, City Attorney of Willmar, Minnesota, has undertaken the chairmanship of the committee, and is getting in touch with other city attorneys to focus attention on their special problems.

Professor W. Thomas Mallison, of George Washington University, will be chairman of the Law School Cooperation Committee; Thomas A. Masterson, Deputy City Solicitor of Philadelphia, will be chairman of the Municipal Tort Liability Committee; Donald S. Frey, of Evanston, Illinois, will be chairman of the Rights of the Individual under Local Government Committee; and Morris Miller, of Washington, D. C., will be chairman of the combined Committee on Housing Law and Regulations and Urban Renewal.

SECTION OF FAMILY LAW

Inspired by the enthusiasm generated by the Miami Beach session, the new Section of Family Law, under the leadership of its new chairman, Clarence Kolwyck, of Chattanooga, has embarked on its varied program in many areas of family law.

These are some of the committees now operating and their chairmen: *Adoption*—Orpha A. Merrill, Norman, Oklahoma; *Custody*—Carl F. Ingraham, Birmingham, Michigan; *The Judge*—Theodore B. Knudson, Minneapolis, Minnesota; *Juvenile Law and Procedure*—Frank W. Nicholas, Dayton, Ohio; *The Practicing Lawyer*—Aaron L. Tilton, Milwaukee, Wisconsin; *Marriage Law*—Morris S. Ploscowe, New York, New York; *Matrimonial Actions*—Stanton L. Ehrlich, Chicago, Illinois; *Membership*—Howard C. Bregel, Baltimore, Maryland; *Paternity*—Fred T. Hansen, McCook, Nebraska; *Public Relations*—Jacob T. Zukerman, New York, New York; *Scope and Program*—Paul W. Alexander, Toledo, Ohio; *Support—John* Alexander, Washington, D. C.

It is hoped that these committees, in which over 300 members are already active, will help to develop the Section's program which is directed toward the achievement of its purpose, as stated in its By-Laws: "To promote the objects of the American Bar Association by improving the administration of justice in the field of family law by study, conferences, publication of reports and articles with respect to both legislation and administration in all matters connected therewith."

Among the immediate goals of the Section are these: (1) Establishment of a Family Law Research Center at the American Bar Center; (2) Studies of the use of family courts as a medium of more effective conciliation; (3) Further discussion of the non-adversary approach; (4) Developing closer relationships with other professions in dealing with all phases of family law; and (5) Encouraging establishment of state bar committees on family law.

Certainly these activities should be of interest to many more hundreds of Association members who may wish to join the Section and to participate in the work of one of its committees. Those so interested are urged to write the Section's Secretary, Professor John S. Bradway, 1729 Fifth Ave., San Diego, California.

Samuel B. Stewart

Gabriel Moulin

SECTION OF CORPORATION, BANKING AND BUSINESS LAW

The November issue of *The Business Lawyer*, published by the Section of Corporation, Banking and Business Law and edited this year by Samuel B. Stewart, of San Francisco, will be of interest not only to Section members who receive the publication as one of the benefits of Section membership, but also to business lawyers generally, for the reports of the Section's proceedings at the Annual Meeting and for its other timely articles.

Dr. Raymond J. Saulnier, Chairman of President Eisenhower's Council of Economic Advisers, addressed the meeting of the Section members at the Annual Meeting on the subject of "Achieving Price Stability as a Basis for Economic Growth in a Free Society". This is not only a brilliant analysis of a contemporary problem of first rank, but also a declaration of national policy. The text appears in the issue and is already the object of special interest and requests on the part of numerous company executives who are aware of its availability in *The Business Lawyer.*

Of interest especially to banking and savings and loan association lawyers are the article by William C. Prather on "Savings Accounts in Savings and Loan Associations" and two speeches, one by Thomas H. Creighton, Jr., on "1959 Legislation Affecting Savings and Loan Associations", and the other by Bryce Curry on "Basic Factors

Affecting Federal Home Loan Bank Board Decisions", both delivered at the meeting of the Section's Committee on Savings and Loan Associations at the Annual Meeting.

The business lawyer will be interested in the authoritative exposition of the Robinson-Patman Act and the need for uniform laws of arbitration in articles by William W. Owens and Alfred B. Carb, respectively. In the area of securities regulation, Malcolm Fooshee and Edward F. McCabe have contributed an article on "Private Placements —Resale of Securities: The Crowell Collier Case". The panel discussion at the Annual Meeting on "Developments in Federal Regulation of Securities", arranged by the Committee on Federal Regulation of Securities under the Chairmanship of Arthur H. Dean, is reported in full. Also appearing in the November issue is the panel discussion on "The Role of the Corporation in Public Affairs" conducted by corporate counsel William T. Gossett, Vice President and General Counsel of the Ford Motor Company; Harold C. Lumb, Vice President in Charge of Legal and Public Affairs, Republic Steel Corporation; and Laurence I. Wood, Labor and Government Relations Counsel, General Electric Company.

The timely subject of federal liens was developed with particular regard to the "Dangers Under Recent Federal Tax Lien Decisions—The Urgent Need To Enact Pending Federal Legislation To Protect Third Parties". The panel discussion has been summarized by John J. Creedon, who acted as moderator of the panel.

Of vital interest to all business lawyers are the addresses constituting the panel discussion on "Changes in Our Economy, Institutions and Human Relationships Likely To Be Brought About During the Next Decade by the Scientific Breakthroughs Now Occurring", in which Lt. Gen. Bernard Schriever, Commander of the Air Research and Development Command, United States Air Force; Dr. Homer Joseph Stewart, Director of the Office of Program Planning and Evaluation of the National Aeronautics and Space Administration; and Dr. Burton F. Miller, Vice President for Advanced Systems Planning of Thompson Ramo Wooldridge, Inc., participated.

The "Editor's Bulletin", a new feature of *The Business Lawyer*, is inaugurated with a discussion of the new California ruling as to cumulative voting in foreign corporations which deliver their securities in that state, even by way of stock dividend. From time to time as events occur of outstanding interest to the business lawyer, they will be similarly noticed by an editorial bulletin, without awaiting the preparation of a formal article. In this instance it is expected that formal articles, one by the Securities Administrator and the other by a practicing lawyer, will appear in the January issue of *The Business Lawyer*.

OUR YOUNGER LAWYERS

Kenneth J. Burns, Jr., Chicago, Illinois, Secretary, Supervisor of Publications;
Elizabeth Elward, Washington, D.C., Editor;
Charlotte P. Murphy, Washington, D.C., Associate Editor

Committee Assignments—1959-1960

Chairman Gibson Gayle, of Houston, Texas, met with other Conference officers and directors in Washington, D. C., on October 9-10, 1959, and made the following announcements respecting Conference committee activities for 1959-1960:

The *Affiliation Committee*, William R. Cogar, Richmond, Virginia, Chairman, will continue its contacts with young lawyer units with which it has been working over the past year in an effort to promote affiliation, with particular attention this year to state as compared with local young lawyer units. Assignments of particular officers, directors and members of the Council have been made to assist the committee with the particular states as one way to maintain and increase contact without necessitating any increase in the committee's budget.

The *Continuing Legal Education Committee*, Wallace D. Riley, Detroit, Michigan, Chairman, will concentrate particularly on practical education of newly admitted lawyers and encourage programs to this end by state and local groups. It will also encourage younger lawyers as participants in programs for younger lawyers, and the subject of professional ethics and responsibility as an additional topic for educational panels.

The *Cooperation with ABA Sections and ALSA Committee*, R. Harvey Chappell, Richmond, Virginia, and John C. McNulty, Minneapolis, Minnesota, Co-Chairmen, will continue to work with other Association Sections to promote increased participation by and opportunity for younger lawyers. All Section chairmen will be invited to attend the Conference's midyear Council meeting at their convenience, where they will be introduced to the Council and asked to comment briefly on their Sections, if they desire. Direct liaison between the Conference and other Sections has been discussed and it is hoped that the committee will be able to establish some such liaison with every Section of the Association either by way of having a particular individual on the Executive Committee of each Section designated as such or by way of having a younger lawyer active in the Section who will take the responsibility of working for increased participation by interested and able younger lawyers.

The *Legal Aid Committee*, J. Rex Farrior, Jr., Tampa, Florida, Chairman, will continue its cooperation with the Legislation Committee in support of compensation for assigned counsel legislation.

The *Legislation Committee*, Edwin R. Schneider, Jr., Washington, D. C., Chairman, will continue its efforts in support of Smathers-Morton-Keogh-Simpson legislation and compensation for assigned counsel legislation, the latter with the assistance of the Legal Aid Committee. This committee will also review other federal legislation of interest to young lawyers, and make suggestions with respect thereto at the Midyear Meeting.

The *Medico-Legal Committee*, John C. Shepherd, St. Louis, Missouri, Chairman, will compile helpful information regarding bibliographies or other written materials in this field. These materials will be made available to young lawyers generally through Junior Bar Conference publications. In addition, the committee will continue its presentation of programs or panels in this field.

The *Membership Committee*, Paul L.

Junior Bar Conference Chairman Gibson Gayle, of Houston, Texas, presented the Conference's Award of Achievement on October 9 to the Junior Bar Section of the District of Columbia Bar Association for its outstanding activities during the Conference year 1958-1959. The District of Columbia Junior Section was proclaimed *Junior Bar of the year* in a competition including all cities with population in excess of 500,000. James R. Stoner, chairman of the group during the period covered by the award, received the award from Chairman Gayle. Walter F. Sheble is the present chairman of the District of Columbia Junior Bar Section.

Jaffe, Philadelphia, Pennsylvania, Chairman, will continue its work in the promotion of admission ceremonies, particularly in areas of the country which as yet have not been fruitful for Association memberships. A brochure on membership is in preparation.

The *Military Services Committee*, J. Parker Connor, Washington, D. C., Chairman, will continue its efforts to increase Association membership by military personnel attending the JAG school at Charlottesville, Virginia. The committee is also interested in federal legislation for incentive pay for military lawyers. The committee's program regarding credit for service time towards state bar admission requirements has been favorably received by the Association's Committee on Lawyers in the Armed Forces.

The *Pre-Law Orientation Committee*, John W. Barnett, New Haven, Connecticut, and John R. Barsanti, Jr., St. Louis, Missouri, Co-Chairmen, will conclude the pilot projects in the cities of Detroit, Fort Worth and Los Angeles, and others to be designated in Connecticut and Florida, whereby high school pre-law counseling as well as tours of law offices and courts by high school students will be organized and operated.

The *Projects Committee*, George Roumell, Jr., Detroit, Michigan, and K. Hayes Callicutt, Jackson, Mississippi, Co-Chairmen, will continue and enlarge upon project information to be disseminated to young lawyer groups by means of Junior Bar Conference publications. This will include the enlargement of the *Projects Handbook*, as well as write-ups of particular projects from time to time during the year. Since the materials included in the *Junior Bar Bulletin* generally pertain to project information, this committee may be given editorial responsibility for the preparation of the *Bulletin* during the year, subject to the supervision of the officer in charge of publications.

The *Public Relations Committee*, John S. Rendleman, Carbondale, Illinois, Chairman, will concentrate on the following: (1) The Law Day, U.S.A. program to be carried out jointly with the United States Junior Chamber of Commerce. The goal is to have every young lawyer group around the country jointly participating with the local junior chamber in some Law Day program or ceremony. Such arrangements will have to be made initially between the Conference state chairman and the presidents of the various state junior chambers. (2) Increase preparation and circulation of news releases containing publicity about Conference activities and personnel. (3) Preparation of a list of program materials available to young lawyer groups. This would include films about the legal profession, and may perhaps be extended to a list of speakers on particular topics.

Publications: Kenneth J. Burns, Jr., Chicago, Illinois, J.B.C. secretary, in charge. The publications for this year will be substantially the same as last year. An additional issue of *The Young Lawyer* will be published in the fall or early winter in the event that the Government Lawyer Placement Service is in effect by that time. Frank C. Jones, Macon, Georgia, is the editor of the *1960 JBC Report.*

Annual Meeting: Edward F. McKie, Jr., and John E. Nolan, Jr., both of Washington, D. C., are Co-Chairmen of this committee for the 1960 meeting and will work with James R. Stoner, Junior Bar Conference director, and Walter F. Sheble, Chairman of the District of Columbia Junior Bar, also both of Washington. It is hoped that the Shoreham will be available as Conference headquarters. The committee has made tentative plans for various social functions and tours. These will be announced as they are completed during the year. It is expected that top-flight speakers will appear on the annual meeting program. An effort will be made to obtain outstanding lawyers in government, industry, and private practice in addition to representative young lawyers of Great Britain.

Midyear Meeting: The meeting will be held this year on Saturday and Sunday, February 20 and 21, 1960, at the Edgewater Beach Hotel in Chicago. In conformity with the purpose of the Midyear Meeting as a business meeting, J.B.C. activities will include, in addition to its own business meetings, emphasis upon the Association, how it works, its policies and objectives. Ross L. Malone, past President of the Association, will be the luncheon speaker on Saturday at which time he will be asked to talk about the Association from a practical standpoint, and Egbert L. Haywood, the member of the Board of Governors assigned as liaison representative to the Conference, will be introduced and his assistance and information solicited. The Junior Bar Conference Section Delegate to the House of Delegates, Kirk McAlpin, will also report. The schedule of events at the Midyear Meeting will be announced when it is finished later this year.

The *Regional Meetings Committee*, Payne H. Ratner, Jr., Wichita, Kansas, Chairman, will concentrate on increasing Conference participation in regional meetings. The main problem is the unavailability of time on the program for Conference activities, which is the direct result of the small attendance of Conference members at regional meetings. The Regional Meetings Committee will work closely with the Association's Regional Meetings Committee.

The *Client's Security Fund Committee*, Richard F. Alden, Los Angeles, California, and Stanley H. Siegel, Lewiston, Pennsylvania, Co-Chairmen, will cooperate with the Association's committee on this subject and will encourage the establishment of security fund committees by state and local young lawyer groups, in order to consider this plan and all its aspects, and to make reports to senior associations.

The *Status of the Young Lawyer in Government Committee*, Edwin S. Rockefeller III, Washington, D. C., Chairman, is planning the development of a service to assist young lawyers seeking employment with government agencies. The committee is available to assist young lawyer groups in obtaining program speakers from the ranks of government lawyers.

The *Committee on Survey of Statutes and Rules Regulating Attorneys' Fees*, Cullen Smith, Waco, Texas, Chairman, will complete its survey, now about half finished.

The *Traffic Courts Committee*, Herbert D. Sledd, Lexington, Kentucky, and Prentice H. Marshall, Chicago, Illinois, Co-Chairmen, will continue Junior Bar Conference co-operation

with the Association's Standing Committee on the Traffic Court Program to promote visitor-violator programs in those cities interested. This committee will also consider youth court projects, such as that now in effect in Kansas City which was described at the meeting by Lewis A. Dysart, as well as the preparation of a pamphlet or brochure on traffic court projects which have been in effect in various areas throughout the country, in addition to the visitor-violator program.

The *Unauthorized Practice of Law Committee*, James R. Sweeney, Chicago, Illinois, Chairman, will continue its concentration on interesting law schools in presenting programs on this subject, and will work for the establishment of state and local unauthorized practice of law committees.

The *World Peace Through Law Committee*, Lewis A. Dysart, Kansas City, Missouri, Chairman, has presented ideas as to what the Conference can do in this field to assist the Association's committee on this subject. The primary purpose of this activity is to study the feasibility of a world conference of lawyers "to consider and recommend means of developing and strengthening, within and among nations, legal concepts, standards, and institutions which will contribute, through facilitating the expansion of a flow of international investment and trade and otherwise, to the economic growth of such nations and which will facilitate peaceful settlement of disputes within and among nations". Five regional meetings have already been held to consult with state bar association heads and other leading lawyers, the consensus of which has been that a world conference should be held, preceded by international regional meetings of lawyers. The Conference will concentrate at this time on the education of American lawyers as to what is involved in attaining world peace through law, with some attention upon how to determine what young lawyers of other nations think and will do about this subject. The committee is to work on the establishment of world peace through law committees by younger lawyer sections and groups, as well as by bar associations generally, on speaker arrangements for professional audiences, such as bar association and law school programs, and the preparation of a brochure which spells out the substance and aims of the programs and how they are to be accomplished. The committee is also to consider how contacts may be set up with young lawyers of other nations.

The *Conference Assembly:* Peter H. Beer, New Orleans, Louisiana, Speaker, and George B. Raup, Springfield, Ohio, Clerk. The speaker and clerk will work with the Annual Meeting Committee to advance the Assembly as the forum not only for the determination of Conference policy but also for the expression of the views of younger lawyers on matters of concern or interest to the profession.

The *Award of Achievement Committee*, Lewis H. Hill III, Tampa, Florida, Chairman, will continue to supervise and execute the Conference awards competition.

The *By-laws and Rules Committee*, Wayne Millsap, St. Louis, Missouri, Chairman, is to make suggestions for improvement in Conference by-laws and Conference Assembly rules of procedure.

This year, the *Inter-American Bar Committee* and the *Liaison with Canadian Junior Bar Committee* will be chairmanned by Robert C. Ward, Miami, Florida, and Robert H. Geffs, Janesville, Wisconsin, respectively. Robert T. Thompson, Atlanta, Georgia, is in charge of the State Presidents' Reception at the 1960 annual meeting.

Conference Officers Attend Section Chairmen Meeting

Chairman Gayle, Vice Chairman William Reece Smith, Jr., Tampa, Florida, and Secretary Kenneth J. Burns, Jr., Chicago, Illinois, attended the meeting of Section Chairmen in Chicago, on October 31, 1959. President-Elect Whitney North Seymour presided at a general discussion of the plans and problems of the eighteen Sections of the Association.

Secretary Burns and John S. Rendleman, Carbondale, Illinois, Chairman of the Public Relations Committee, represented the JBC at the National Conference on Judicial Selection and Court Administration at the Edgewater Beach Hotel in Chicago on November 22-24.

Books for Lawyers

(Continued from page 1303)

man's loophole is another man's equity".

The symposium is not intended to be a detailed study of the effect of particular tax provisions on the economy as a whole, as was the *Effects of Taxation* series prepared by Harvard University Graduate School of Business Administration some years ago. Nor does the study hold much technical interest for the individual tax practitioner who is already familiar with most of the provisions discussed herein.

The symposium is interesting, however, in that it re-emphasizes how each group has developed a vested interest in tax rules that benefit it, and the consequent difficulty of objectively reshaping tax policy. From that standpoint it is to be pitied that a more representative group of speakers was not obtained. Most of the speakers were tax lawyers and accountants, who have a strong bias towards tax reduction for their clients. Unfortunately, it is difficult to find more objective minds able to discuss such a technical subject objectively. To the person who is not familiar with our tax laws, who might have naïvely assumed that every dollar of income stands on the same tax footing, the brief review afforded by this symposium might come as a revelation. But most of this is familiar territory to any one who has any professional experience in tax analysis.

THEODORE BERGER

Chicago, Illinois

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe, Washington, D. C., Editor-in-Charge

LAW SCHOOL LIFE: The reason why the parent of a law school student should subscribe to his son's law school newspaper is obvious to anyone who reads them. Only in this way can you discover what your son is doing in those few hours he condescends to tell you he is not "hitting the books". Take the *Harvard Law Record* "America's Oldest Law School Newspaper" (single copy twenty cents; two dollars per term or four dollars per year; 23 Everett St., Cambridge 38, Mass.). The parent who received it last year was told of the visit and remarks at the Harvard Law School of the following visitors among others: Ambassador Aban Ebban of Israel (October 16 and 23, 1958), Ambassador W. C. du Plessis of South Africa (December 4, 1958), Fidel Castro of Cuba (April 30, 1959) and Carmine De Sapio, the leader of Tammany Hall (April 9, 1959).

But of all the visitors to the Harvard Law School campus during the academic year, 1958-1959, the ones that interested me the most were the Beatnik poets. Reporter Levinson in the *Harvard Law Record* of March 26, 1959, gave them this advance billing:

Crazy Daisy Delivers
Beatnik Poetry Tonight

Allen ("I'm crazy as a daisy") Ginsberg, Peter ("I'm very fine and happy and crazy as a wildflower") Orlovsky, and Gregory ("I'm not crazy at all") Corso will invade New Lecture Hall, Kirkland and Oxford Streets, Cambridge, this evening at 8 p.m. under the auspices of the Harvard Law School Forum and the Harvard Poetry Forum. The session, entitled "Howl and Other Poetry", will be devoted to poetry readings followed by questions from the audience. It will be moderated by a member of the Harvard Faculty.

The three panelists are modern generation poets, dubbed "Beatniks" by the popular press. Mr. Ginsberg is the author of *Howl*, a recently published collection of poetry. Mr. Orlovsky is a mental-hospital attendant. Mr. Corso is "hollyhocks."

Tickets are 95 cents (at 23 Everett Street, the Coop, or the door); and it should be "fried shoes."

A reporter who adopted the nom de plume of "Skeezix" described the event in the April 9, 1959, issue of the *Law Record* as follows:

Enthralling Evening
With the Artists

The speakers had not yet arrived, but the New Lecture Hall was full.

Two lads sat across the aisle in levis, sneakers, and fatigue jackets. They chomped on their dentyne and fingered their dark sunglasses. Up in the balcony, a bunch in peppermint-striped sweatshirts guzzled their beer impatiently. A young woman with a shock of platinum hair and her own book of poems slid into her seat. There were more tieless spectators than are usual for a Forum function. Even among the more conservative elements, there seemed to be a tendency to make the guests feel at home. (Several seemed to have gone unshaven that morning just for the occasion.) There was a constant buzz as people called out to one another, looking for seats.

The three speakers arrived. The buzz grew to a din. It was an expansive assemblage. "Giddy," said Mr. Ginsberg. Cheers were followed by a rousing round of "Happy Birthday to You" when the group was informed it was Mr. Corso's 29th.

The poetry reading began. As if by cue, the continual trickle of parties getting up and leaving the auditorium started.

"The Ignu!"—Mr. Ginsberg cleared his throat and went on. The silence was broken occasionally by nervous titters and knowing guffaws. "Phantasmagoria!"—Corso read on about his friends "all scroungy and bearded and waiting to get at the food." In the balcony, there was a commotion as a cascade of beer cans tumbled to the floor and the undergraduates headed for the exit and Harvard Provisions.

"There is a lion in my living room!" There was a greater rush for the door. Some clomped out defiantly as if they wished to be noticed leaving. Others hissed those departing.

The reading went on. Mr. Corso praised the power of laughter, Mr. Ginsberg cried for his Aunt Rose, Mr. Orlovsky offered the Christus a raspberry egg cream.

When the questions were over, it was noted that the eight blue-coated policemen had done a fine job of enforcing the smoking regulations.

—Skeezix

My Harvard scouts tell me that the "young woman with a shock of platinum hair" in Skeezix's yarn was none other than a first-year lady law student who bought a platinum wig and dressed as a Beatnik for the occasion. And this is what an aging parent can discover about his son's actual law school life, if he will but subscribe to the law school newspaper. How stupid can you be, just to take the school law review in which there is not a chuckle from cover to cover?

S. E.C.: Far from Wall Street down in Durham, North Carolina ($1.50 per copy), the *Duke Law Journal* with its new orthodox format has an interesting note on the *Arvida* issue (pages 460-469). Readers will recollect that Arthur Vining Davis transferred over 100,000 acres, or more than 155 square miles, of Florida real estate to Arvida for development. In advance of S.E.C. registration of a public offering of twenty-five to thirty million, Carl M. Loeb, Rhoades and Company and Dominick and Dominick issued a press release, stating that a registration statement was in preparation and describing the objectives of Arvida's development program. The S.E.C. moved to enjoin further press releases and to cancel the broker-dealer registration of Loeb-Rhoades and Dominick. A consent decree (169 F. Supp. 211) and an S.E.C. Release (No. 5870)

ended the affair in favor of the Commission. The note writer, Richard Roe, of Duke, doubts the correctness of the rulings.

SUPREME COURT: In the January, 1959, *Michigan Law Review* (Vol. 57, No. 3, pages 315-348) Professor Bernard Schwartz, of New York University Law School, has an interesting discussion of the more important decisions at the October, 1957, Term (2.00, Ann Arbor, Michigan). He cheers the Court's ruling that the President cannot remove the head of the War Claims Commission, a quasi judicial agency (*Wiener* v. *U. S.*, 357 U. S. 349). He deplores the granting of a passport to Rockwell Kent (*Kent* v. *Dulles*, 357 U. S. 116) as "a sharp break with prior law" consigning "to jurisprudential limbo" the assumption that "a passport was a mere privilege on which Government had the final word" (page 322). Quoting Mark Twain ("The more you explain it, the more I don't understand it"), Professor Schwartz complains that, after reading and rereading, he cannot understand why Mr. Justice Brennan decided that Congress could deprive Perez of his citizenship for "such harmless conduct as voting in a foreign election" (*Perez* v. *Brownell*, 356 U. S. 44), but not have the power to expatriate Trop for desertion in time of war (*Trop* v. *Dulles*, 356 U. S. 86).

Recalling Mr. Dooley, Schwartz found in the decisions at the 1957 Term a "response of the high Court to public opinion". Among others, he refers to the defense plant cases (*Borg-Warner*, *Continental Motors*, *Murray* and *American Motors*, 355 U. S. 466, 484, 489 and 356 U. S. 21). As we know, the decisions at the 1958 Term (particularly those on June 8, 1959) confirm the shrewdness of this observation.

I particularly enjoyed the discussion by Dr. Schwartz of the loyalty cases (*Lerner* v. *Casey*, 357 U. S. 468, and *Beilan* v. *Board of Education*, 357 U. S. 399) and the criminal cases (*Payne* v. *Arkansas*, 356 U. S. 560, which Schwartz sees as a reversal of *Stein* v. *United States*, 346 U. S. 156; *Crooker* v. *United States*, which Schwartz regards as an improper application of *Betts* v. *Brady*, 316 U. S. 453, in a capital case; *Hoag* v. *New Jersey*, 356 U. S. 464, which he views as a "sacrifice of substance to form"; and *Benanti* v. *United States*, 355 U. S. 96, with "its clear implication that state police commit a federal violation whenever they engage in wiretapping even though the wiretapping is expressly permitted by a state law" (page 342)).

Professor Schwartz concludes that "the key polar figures" are Justices Black and Frankfurter. Their rival philosophies divide the Court; the one activist, the other passive. And I infer that Dr. Schwartz stands with Mr. Justice Frankfurter because he says "if there is any one factor that has contributed to the mounting criticism of the present Court, it has been the strength shown on it of the Black activist position" (page 348). On the other hand, he reports in some detail an incident on October 15, 1957, where there was a bit of an argument between the Chief Justice and Mr. Justice Frankfurter (pages 344-345 as reported in *Life*, June 16, 1958, page 93). And Schwartz adds, "This type of backbiting in public has characterized several sessions of the Court during the past term." While he says, "the present situation in this respect has not deteriorated to anything like that in the Court under Chief Justice Stone, when a series of bitter personal feuds brought the high bench close to institutional chaos", nevertheless, "the flowering of personal dissension on the Court

threatens to destroy what had been hoped to be Earl Warren's main contribution to the supreme tribunal. Dissonance among the justices bids fair to become the dominant characteristic that it was in the court between Hughes and Warren" (page 345).

ZONING: George H. Foss, of the Florida Bar, former Planning Director of Birmingham, Alabama (1955-57), and Senior Planner-Attorney for St. Petersburg, Florida (1958), has written an excellent article entitled "Interested Third Parties in Zoning" for the *Florida Law Review* (Vol. 12, No. 1, Spring, 1959; $1.50 per copy; Gainesville, Florida). It nicely blends legal and practical considerations affecting local zoning practices. Of particular interest is the section dealing with the variances between zoning theory and practice and a discussion of the practical and legal difficulties faced by residential property owners seeking protection from zoning boards whose members tend to be "real estate development oriented". The article manifests a keen awareness of the inadequacies of zoning law administration at the local level and the consequent adverse effect on the community as a whole from the overemphasis in practice on the supposed increases in land values and taxes said to result from alleged "improvements" occasioned by relaxation of zoning restrictions, although, in fact, a net loss to the community may often result. This comment is not only mine but also Sam Fishman's of the Office of General Counsel of the Navy who is well known to the Zoning Board of Silver Spring, Maryland. And when Sam finds a piece on zoning of assistance, it has to be good because those of us who know him think of Sam's Zoning Head as the same as Goldsmith's School Master's.

Who Writes Our Regulatory Opinions?

(Continued from page 1264)

an agency would be reversed but for the fact that a group of technicians have plugged every loophole on an ex post facto basis after the decision was made, then that decision ought to be reversed. Appellate courts should deal with the real thinking of the deciders, not with the rationalizations of a professional group who figure out after a decision is made what the deciders ought to have thought.

Finally, there is the argument that this is all just too much work for the members of regulatory agencies. With this argument the proponents of anonymous group-opinions find themselves impaled on two sharp dilemma horns. For if the members of an agency do, in fact, decide the cases that come before them, and if in order to decide these cases they go through all the requisite mental processes, then there should be little extra burden in setting these mental processes down in an opinion. But if, as a matter of fact, they do not go through the requisite mental processes, then their decisions are in reality not supported by the necessary legal and factual foundations and are not rendered in accordance with law.

The Attorney General's 1941 Report on Administrative Procedure summed up the whole matter very well. "The heads of the agency", it said, "should do personally what the heads purport to do."[10] And that is all that the Oversight Committee recommendation asks them to do.[11]

Many solutions are currently proposed for the so-called "problem" of the administrative agencies. These include higher pay, longer terms, rotation between agencies, and a wide gamut of reorganizing plans. I have proposed some myself in a recent memorandum to the President at the time of my resignation from the CAB.[12] I believe, however, that requiring the members of agencies to do their own opinion-writing will by itself be a long step toward solving certain aspects of the "problem". It will greatly reduce the impact which a chance remark, an article in a trade journal or a vague general theory sometimes seems to have on administrative decisions, because

10. Attorney General's Committee on Administrative Procedure, Final Report 52 (1941).

11. Since this article was written, Representative Harris has introduced a bill, H.R. 4800, 86th Cong., 1st Sess. (1959), which amends the Communications Act of 1934, the Federal Aviation Act of 1958, the Federal Power Act, the Federal Trade Commission Act, the Interstate Commerce Act, and the Securities Exchange Act of 1934 and which provides in each case:

> The Commission [Board] shall designate one of its members to prepare or to personally direct the preparation, in writing, of a statement of the reasons or basis for the decision of the Commission [Board] in each case decided by the Commission [Board]. Each such statement shall be signed by the member of the Commission [Board] who was responsible for its preparation. Members shall be designated to prepare or direct the preparation of such statements so that, insofar as possible, (1) each member of the Commission [Board] will be responsible for the preparation of such statements with respect to every type of case decided by the Commission [Board], and (2) no member of the Commission [Board] will be responsible for the preparation of a substantially greater number of such statements than any other member of the Commission [Board] with respect to any type of case decided by the Commission [Board].

12. Hector, *Problems of the CAB and the Independent Regulatory Commissions*, Memorandum to the President (1959).

the deciders will have to study the actual record in each case. It will discourage the litigant who hopes to sway a decision by presenting a partial or distorted picture of the record. It will, in short, bring together the decision-making process and the facts in the case.

All of this will be harder work for members of the agencies, but it will thus limit appointments to men who want to work hard. And as the members personally explain their own reasons for their decisions, as they begin to show "a decent respect to the opinions of mankind", so they will gain in turn the ever-growing measure of respect in the eyes of mankind—and what is even more important, perhaps, a greater measure of care and respect in their own eyes for their own decisions.

One troublesome question remains: If this change comes about, what can we do with the opinion-writers? They are hard working, learned, intelligent men; they are devoted civil servants. Personally, I think they are a good pool from which to select not only new top staff officers and new hearing examiners for the agencies, but also new members of the regulatory agencies. After all, they have well developed one of the basic requisites for good hearing examiners or agency members—the ability to write their own opinions.

Court Congestion

(Continued from page 1268)

> separate trial may be had upon such issue of liability, upon motion of any of the parties or at the Court's direction, in any claim, cross-claim, counterclaim or third-party claim.
>
> In the event liability is sustained, the court may recess for pretrial or settlement conference or proceed with the trial on any or all of the remaining issues before the Court, before the same jury or before another jury as conditions may require and the Court shall deem meet.
>
> The court, however, may proceed to trial upon all or any combination of issues if, in its discretion, and in furtherance of justice, it shall appear that a separate trial will work a hardship upon any of the parties or will result in protracted or costly litigation.

Sections of the Illinois Civil Practice Act dealing with joinder of plaintiffs and defendants confer on the trial court discretion to order separate trials and otherwise to protect the parties from injustice or unnecessary expense. (Ill. Rev. Stats. (1957), c. 110, Secs. 147, 148; Rule 11, Ill. Supreme Court Rules, Ill. Rev. Stats. (1957), c. 110, Sec. 101.11; *Opal* v. *Material Service Corp.*, 133 N.E. 2d 733, 9 Ill. App. 2d 433.) The Illinois Supreme Court has held that under Section 1, Article 6 of the Illinois Constitution, it has the rule-making power for practice and procedure (*People* v. *Callopy*, 358 Ill. 192, 192 N.E. 634; *Gijure* v. *Sloan Valve Co.*, 367 Ill. 489, 11 N.E. 963; *King* v. *Missouri*, 107 U. S. 221). In *Eley* v. *Gamble*, 75 F. 2d 171 (4th Cir., 1935), it was held that due process does not require any particular form or method of procedure. Once a method is specified by rules of court, however, litigants must substantially comply with the requirements of these rules so that the orderly disposition of the business of the court may be facilitated and the prompt administration of justice be expedited. (*Village of Barrington* v. *Lageschulte*, 323 Ill. 343, 154 N.E. 137.)

An early determination of the liability issue will dispose of the entire case in the 40 per cent of trials which result in "not-guilty" verdicts. (*Delay in the Court*, page 99.) In those cases it will save the 70 to 80 per cent of trial time generally consumed by medical testimony, hospital records, X-rays, physical examinations and treatment pertaining to the nature and extent of the injuries and the amount of damages. We have all presided over many cases which were settled after convincing proof of liability had been introduced or when both parties realized the futility of further litigation. Many exaggerated *ad damnum* cases have been non-suited under such circumstances for a minimum settlement hardly sufficient to cover the costs.

The rule is limited to personal injury and other civil cases wherein the issue of liability is separate from and independent of the issue of damages. There are some common law cases in which damages must be proved in order to establish liability, as in suits predicated upon fraudulent transactions, and we should, therefore, leave the separation of issues in cases wholly within the discretion of the trial judges (*McClain* v. *Socony-Vacuum Oil Co.*, 10 F.R.D. 261; *Mount* v. *Dusing*, 414 Ill. 361, 111 N.E. 2d 502).

The function of improving the proce-

dural phase of the law for the achievement of justice is committed to the courts. (Pound, "Procedure under Rules of Court in New Jersey," *Harv. L. Rev.* 28 (November, 1954).) Dean Wigmore insisted that "All rules of procedure in courts, not expressly or impliedly prescribed by the Constitution, fall under the judiciary power, for the purpose of making or changing them." (Wigmore, "Legislature Has No Power in Procedural Field", 20 *J. Am. Jud. Soc.* 159, 160 (1936).)

Let us humanize and modernize our professional practice and raise its standards. We must fight with every resource at our command the scandalous practices which visit shame and disgrace upon our institution and which destroy the spirit of the litigants. The time for our court to act is now, before we fall even further behind in our work. We owe it to our litigants to set the machinery in motion for the early disposition of lawsuits. If we ignore our responsibility, we admit professional bankruptcy.

The new rule is grounded on necessity and public welfare. The crucial problem which this rule attempts to alleviate demands the intervention of an intelligent, constructive and progressive judiciary. By having adopted this rule, our court has given real meaning to the wisdom of Attorney General William P. Rogers (*1958 Proceedings of the Attorney General's Conference on Court Congestion*, page 6):

> In the years ahead I believe our profession must give greater emphasis to improving the administration of justice in order to provide the public with better service. Our profession has just one product: justice for people. We must expedite the administration of justice so that the right result is obtained at the right time for the person involved. There is a growing demand throughout the country that we work for this objective.

It was with a sense of great concern and deep dedication that I recommended the adoption of this measure. We judges have a solemn duty and opportunity. Paraphrasing the immortal Lincoln's admonition—We can nobly save or meanly lose the greatest democratic system for the administration of true justice.

Albert Sherman Osborn

(Continued from page 1287)

courtrooms. He presented ideas as to the use and reception of expert testimony in court. He outlined many practical suggestions to trial lawyers regarding the cross-examination of opposing experts who were considered to be wrong in the opinions they expressed in court, and as to how to present the testimony of their own experts.

The books and articles of Mr. Osborn are studied throughout the world, certain of them having been translated into other languages. It is quite probable that more of his writings have been quoted by lawyers, judges and appeal courts than those of any other layman. His works influenced legislatures to pass laws which removed many of the old hindering restrictions and which made it possible to present document expert testimony in a more thorough and scientific manner.

Osborn's Work . . . Influence in Court

Thus the tremendous influence of Mr. Osborn has been threefold in the administration of justice; first, on document examiners everywhere, resulting in raising the standard of their work; second, on lawyers and judges, resulting in a far better reception in court of expert testimony by qualified document examiners; and third on legislators, resulting in the passage of needed laws. The effective manner in which the document evidence was handled in the Rice-Patrick murder and forgery case made a deep and favorable impression on the Bench and Bar. Eighty-year-old millionaire W. M. Rice died under suspicious circumstances. His will bequeathed his estate of some six million dollars to build a university in Houston, Texas. However, soon after Rice's death people were astounded when a later will was filed for probate. This new will left Rice's fortune to his trusted friend and adviser, Albert T. Patrick. It bore the purported signature of W. M. Rice on each of its four pages. Mr. Osborn was immediately engaged to examine the document and he soon discovered that all four signatures were forgeries by the tracing method. He clearly demonstrated in court that the four signatures suspiciously superimposed on each other, something genuine signatures never did. Osborn was corroborated by other handwriting experts of the day. The effective testimony of these experts resulted in the Patrick will being declared a forgery. Rice's estate, which had increased several million dollars in the meantime, was finally used to establish the celebrated Rice Institute of Houston, Texas. Another interesting phase of the case was that Patrick was tried and convicted of the murder of Rice but later pardoned by the Governor.

In the Patrick case the handwriting experts were allowed to state reasons for their opinion, and demonstrative photographs were introduced in support of their reasons. However, in many other jurisdictions the old ham-

pering restrictions to effective expert testimony were still the rule and Mr. Osborn kept on with his campaign for improvements.

From the time Mr. Osborn went to Rochester he had been studying the subject of typewriting identification. It had been generally assumed that typewriting, being the product of a mechanical device, could not be identified as having been written on a certain *make* of typewriter or on a certain *individual* machine. Osborn soon came to the definite conclusion that not only could the make of typewriter be determined but also that the individual typewriter could be identified, and in some instances even the identity of the typist could be established. His pioneering work in typewriter identification and the measuring devices he had invented became very useful as early as 1908.

During the colorful Teddy Roosevelt's Administration, an acrimonious dispute arose in 1908 between Congress and the Administration over the proportionate number of battleships and submarines that should be built. A Select Committee under House Resolution No. 288 held hearings to investigate the subject. The matter grew into a raging controversy, resembling some of the recent McCarthy subversive hearings in the Senate. Charges and counter-charges of graft and corruption were made. During the bitter hearings some important typewritten anonymous documents came into question and were injected into the middle of the dispute. The committee boldly declared these anonymous letters to be "a cowardly attempt to blacken the character and defeat the nomination and ruin the career of Representative Loud, Michigan". It was imperative that the origin of the documents should be run down. Again Mr. Osborn became a key witness in identifying the typewriter that was used to type "these infamous letters".

By this time Mr. Osborn had become widely known as a highly qualified document examiner. His business had grown to such proportions that in 1910 he moved from Rochester to New York where he opened an office and began devoting his entire time to questioned document work.

Cases came to him from almost every state in the Union, from every province in Canada, and from other countries as well. He was a direct, forceful, convincing witness. He possessed a keen sense of humor and ready repartee. Jurors, lawyers, judges and spectators were impressed by his distinctive manner of testifying. Mr. Osborn did not consider that a court of justice was a place for frivolity, nor did he believe that giving testimony was merely a battle of wits. However, any antagonist who attempted to embarrass him by casting aspersions on him or his profession generally learned to his regret that Osborn was not a man to sit meekly by and allow a challenge to go unheeded. In one instance a flippant cross-examiner sought to hold him up to ridicule by asking "You know so much about this writing, I presume you could tell me whether or not it was written while the writer was riding on a mule's back?" Quick as a flash Osborn replied "I have not had the experience of examining writing which was written on a mule's back but I have had considerable experience with jackasses." The reply was so devastating in its effect that the upset cross-examiner promptly sat down and asked no more questions of Osborn.

The Lindbergh Kidnaping . . . The Zenith of Osborn's Career

When the baby of the world's hero, Charles A. Lindbergh, was kidnaped and murdered in 1932, Mr. Osborn was one of the first experts selected to examine the extortion letters that came to Lindbergh demanding $50,000 ransom. The handwriting of hundreds of suspects was examined. Finally when specimens of the handwriting of Bruno Richard Hauptmann were submitted to Osborn, he positively identified Hauptmann as the writer of the ransom letters. Hauptmann was soon thereafter charged with murder.

As an expert witness at the trial Mr. Osborn stated his definite conclusion that Hauptmann had written the extortion letters, and in clear and incisive language gave his reasons for that conclusion. At the end of his direct testimony Osborn stated "the physical connections between these writings, in my opinion, are irresistible, unanswerable and overwhelming". Seven other reputable document examiners who had independently examined the writing testified that in their opinion Hauptmann was the writer of the ransom letters. Hauptmann himself said "Dot handwriting is the worstest thing against me." The jury found Hauptmann guilty, and the New Jersey Court of Appeals affirmed the verdict.

It has been frequently stated that expert testimony reached its zenith in the Lindbergh-Hauptmann case. Each of the eight handwriting experts for the State was given full and courteous attention by the trial judge and by the jury. Each expert gave reasons in detail for his expressed opinion and made clear his reasons by the use of enlarged photographs. This was a far cry from the procedure in the Molineux case where photographs were excluded and where the trial judge made derogatory and derisive remarks about experts.

Two of the sincerest admirers of Mr. Osborn's efforts over the years to raise the standards of document examination and to improve the reception of document expert testimony in court were Roscoe Pound, Dean of the Harvard University Law School, and

Dean John H. Wigmore. The reputation of these two men for discernment and legal learning needs no embellishment here. In writing an introduction to Mr. Osborn's book *Questioned Documents* (1910) Dean Wigmore said:

> The feature of Mr. Osborn's book which will perhaps mark its most progressive aspect is its insistence upon the reasons for an opinion,—not the bare opinion alone. If there is in truth a science (and not merely an individual empiricism), that science must be based on reasons, and these reasons must be capable of being stated and appreciated. Throughout this book may be seen the spirit of candid reasoning and firm insistence on the use of it. I believe that this is the spirit of the future for the judicial attitude towards experts in documents. If judges and lawyers can thoroughly grasp the author's faith in the value of explicit, rational data for expert opinions, the whole atmosphere of such inquiries will become more healthy. The status of the expert will be properly strengthened, and the processes of a trial will be needfully improved.

Dean Roscoe Pound in writing an introduction to Mr. Osborn's last book, *Questioned Document Problems* (1944), states:

> A book by Mr. Osborn on the problems of proof as to questioned documents needs no introduction by anyone. His name is a sufficient guarantee of matter which judges and lawyers and all who have to do with such problems must look into and, in the words of Captain Cuttle, when read "make a note on't." It is not too much to say that he has created the profession of examiner of questioned documents in this country and has turned what had been largely a matter of superficial guesswork or plausible advocacy into a matter of scientific investigation and demonstration.

Osborn's campaign to make document examination an important factor in the administration of justice had borne fruit. It had been a long, tedious, uphill fight. Today the testimony of honest, competent document examiners is received in court with dignity and respect in almost every jurisdiction throughout the land.

For many years prior to the Lindbergh-Hauptmann trial, Mr. Osborn had annually invited many of the leading document examiners to meet for educational discussions of problems incident to questioned document work. Each person invited was of unquestioned integrity, with a sincere thirst for more knowledge on the subject. Each expert was required to present a paper at the meeting on a subject previously assigned. This procedure proved to be of tremendous value to these document examiners, thus furthering the objective of achieving merited recognition of the profession of document examination.

Subsequently Mr. Osborn and others thought this group should become a formal association, and in 1942 the American Society of Questioned Document Examiners was organized with Mr. Albert Sherman Osborn as its first president, a position he held for four years.

Mr. Osborn remained active and influential right up to the time of his death in 1946. His formal education and scholastic attainments were not marked by milestones of diplomas and degrees, but were characterized by the steady climb toward the rarified plane of learned men. He was a wide and constant reader of both literary and scientific books and with his keen analysis and penetrative understanding of the author's ideas, combined with his unusually retentive memory, he pushed to the very heights of learning. He could discourse intelligently on a wide variety of subjects and usually with the utmost authority. He was an educated man in the fullest meaning of the word.

Mr. Osborn was a man of innate kindness, warmly human. His rich and unfailing sense of humor was captivating and infectuous. Despite his conspicuous successes he remained deeply humble throughout his long and brilliant career.

One arises from a contemplation of the life of such a man as Albert Sherman Osborn with a profound appreciation and respect for his dignity and learning, for his zeal and fortitude, and for the ability with which he led others forward in the long struggle to advance the administration of justice.

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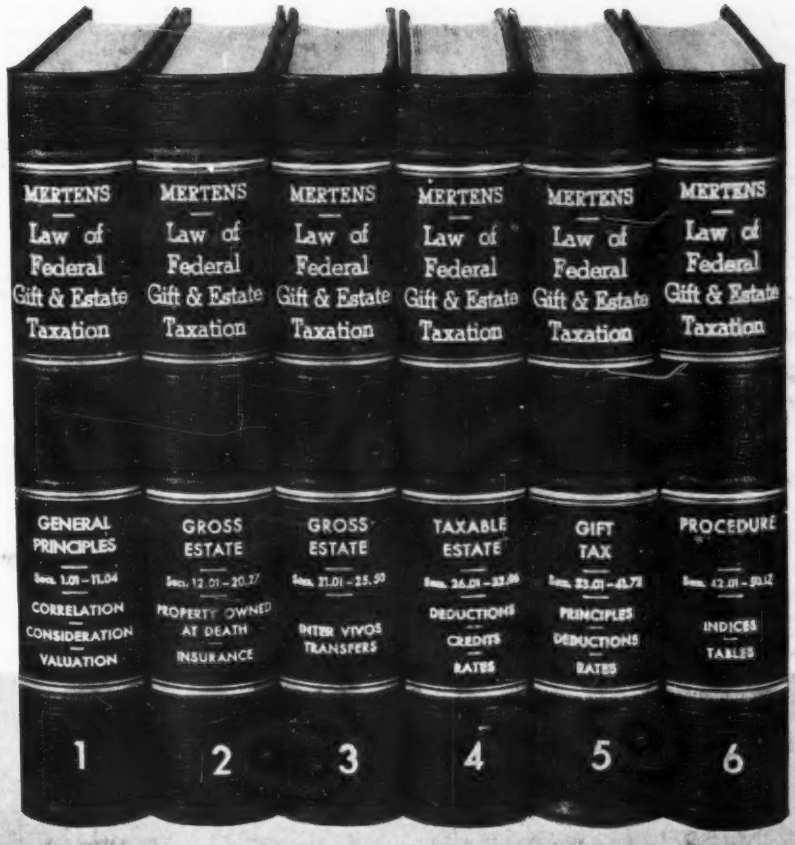

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